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REPORTS OF CASES

DETERMINED IN THE

Supreme Court

OF THE

STATE OF WASHINGTON

CONTAINING

DECISIONS RENDERED FROM JANUARY 16 TO MAY 2, 1903,
INCLUSIVE.

EUGENE G. KREIDER,
REPORTER.

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JUDGES OF THE SUPREME COURT OF THE STATE OF WASHINGTON.

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Hon. RALPH O. DUNBAR . . . JUDGE
Hon. WALLACE MOUNT . . . JUDGE
Hon. HIRAM E. HADLEY ** . . . JUDGE

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W. B. STRATTON Attorney General
C. C. DALTON Ass't Attorney General
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*Succeeded Judge Reavis as Chief Justice, January 13, 1903.

**Elected November 4, 1902, to fill term beginning January 13, 1903.

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*Appointed March 13, 1903, by the Governor, in pursuance of the act of March 6, 1903.

**Appointed February 14 1903, by the Governor, in pursuance of the act of February 13, 1903.

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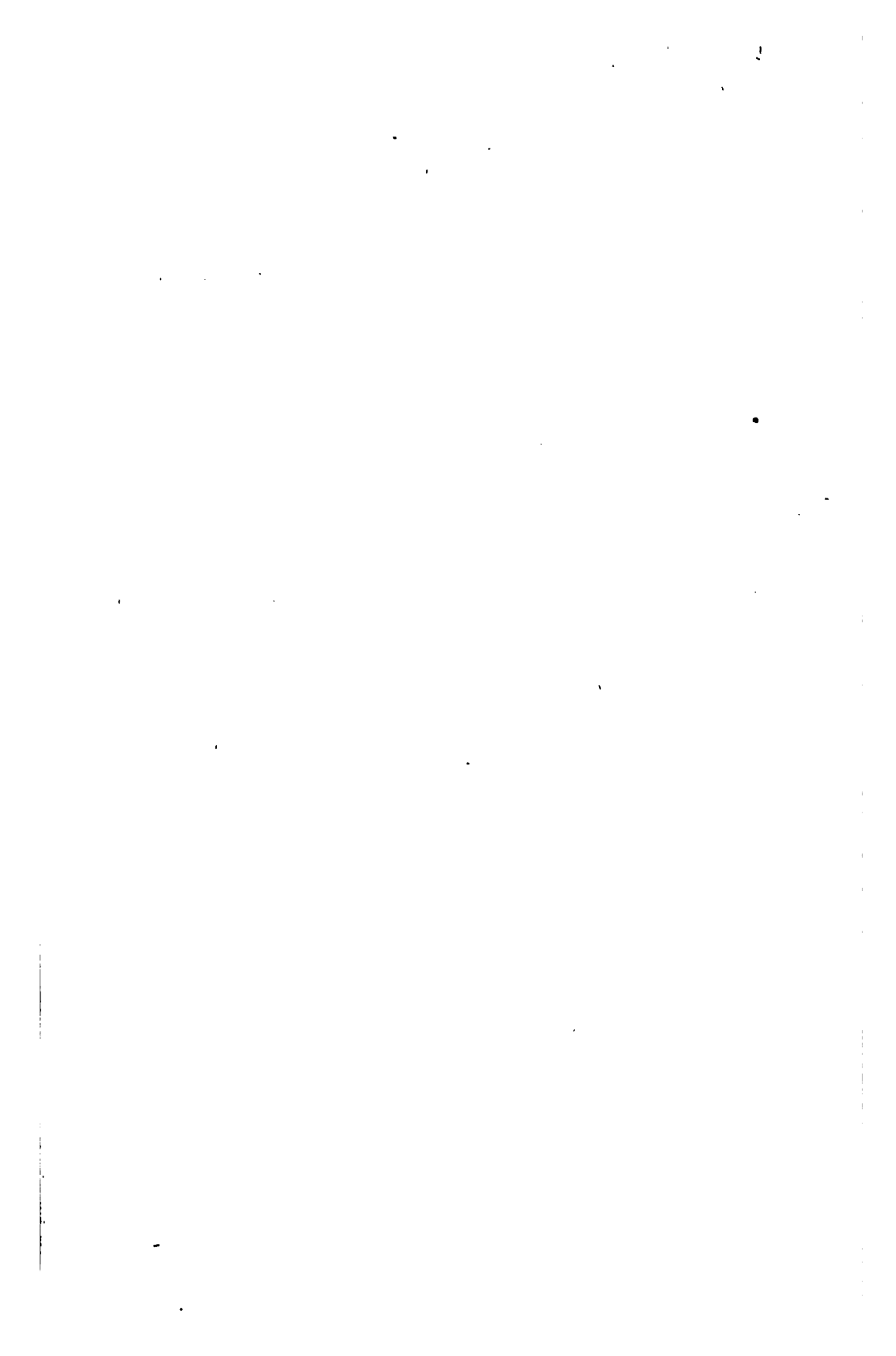
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ERRATUM.

Page 195. Ninth line from bottom, read "viction" in place of "victim."



REPORTS OF CASES

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF WASHINGTON

[No. 4395. Decided January 16, 1908.]

JOHN PETH *et al.*, Appellants, v. B. L. MARTIN *et al.*,
Respondents.

SCHOOL DISTRICTS — PETITION FOR UNION — TIMELINESS OF ACTION ON.

Where a petition for the union of two school districts was not acted upon by the board of directors of one of the districts until more than a year after its presentation to them, and in the meantime the board had submitted to vote another petition for a union of districts, including the two in the original petition with others, which was submitted to a vote of the district and rejected, the board would be without power to submit the original petition, since it must be deemed as waived by failure to act upon it within a reasonable time, and by the act of submitting a later petition to popular vote.

SAME — NOTICE OF ELECTION — SUFFICIENCY.

A notice of election to determine the question of a union of school districts, which fixes the opening of the polls at 4 o'clock, p. m., and fails to designate the hour of closing, is illegal, under the mandatory provisions of Bal. Code, § 2420, which provides that such notices shall designate the "hours between which the polls are to be kept open," and that, "unless otherwise designated in the notice of election, the polls shall be open at 1 o'clock in the afternoon, and close at 4 o'clock in the afternoon; but the board of directors may determine on an hour before 1 o'clock, but not earlier than 9 o'clock in the forenoon, for opening the

polls, and for closing an hour after 4 o'clock, but not later than 8 o'clock in the afternoon."

Appeal from Superior Court, Skagit County.—Hon. GEORGE A. JOINER, Judge. Reversed.

J. L. Corrigan, for appellants.

M. P. Hurd, for respondents.

The opinion of the court was delivered by

MOUNT, J.—This is an action to restrain the organization of a union or graded school for school districts Nos. 4 and 15 in Skagit county. It was alleged in the complaint that the petition for the union of these districts, which was acted upon by the board of directors of district No. 4, was not sufficient, and also that no notice, as required by law, was given of the election, and for other reasons. It will be unnecessary to notice the other reasons, or the assignments of error based thereon. On a trial in the lower court judgment was rendered dismissing the cause, and this appeal is prosecuted from that judgment.

It is conceded that the petition circulated in one of the districts asking that the question of a union be submitted to the electors, was signed and presented to the board of directors of the district more than a year prior to any action being taken thereon, and that between the time the petition was presented to the board and the time the order was made for an election to be held thereon another petition was presented, asking for the union of these two districts with two other contiguous districts; that this last named petition was acted upon by the board, and the question of uniting these four districts was submitted to an election, and the election was unfavorable. Subsequently the first petition was acted upon by the

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board without another petition therefor. The statute in force at the time (§ 2280, Bal. Code) was as follows:

“Whenever the residents of two or more school districts may wish to unite for the purpose of establishing a union or graded school, the clerks of said districts, by order of the boards of directors, shall, upon a written or printed petition of five or more heads of families of their respective districts, call a meeting of the voters of such districts at some convenient place, by posting written or printed notices in like manner as is provided for calling annual school district elections. . . .”

Clearly the authority of the directors to order such an election depends upon the written petition therefor. *Dartmouth Savings Bank v. School Districts*, 6 Dak. 332 (43 N. W. 822); *Fractional School District v. Metcalf*, 93 Mich. 497 (53 N. W. 627); *Rayfield v. People ex. rel. McElvain*, 144 Ill. 332 (33 N. E. 188).

No time is fixed by the statute when the board shall act on such petition. The board must, therefore, act upon it within a reasonable time. Where there is no showing which would excuse the delay, a year or more is certainly not within a reasonable time. The only showing attempted in this case was that another petition was presented in the meantime to unite two other districts with the two in question, and for a union school comprising four districts instead of two. This petition was accepted and acted upon by the board, and submitted to the electors. If the election upon this proposed union had been successful, it certainly could not be claimed that the original petition had not been abandoned. The order of the board of directors upon the last petition, including all four of the districts in one, would, in that event, certainly be held to amount to a rejection of the first petition, or an abandonment thereof. The result of the election could not change this effect. The fact that the election was opposed to the

union of the four districts could not revive the petition which had been waived or rejected. We think that the subsequent petition and order for election did not excuse the delay, but constituted an additional reason why the first petition must be held to have been abandoned, and of no further effect. Before the board of directors could legally call an election for the union of districts 4 and 15, as originally proposed, another petition to that effect was necessary.

We are also of the opinion that the notice of the election was not sufficient. The statute prescribing the notice is in § 2420, Bal. Code, and is as follows:

“The district clerk must give at least ten days’ notice of such school election, by posting or by causing to be posted written or printed notices thereof in at least three public places in the district, one of which must be the place of holding the election. Said notice must designate the place of holding the election, day of holding the election, hours between which the polls are to be kept open, names of offices for which persons are to be elected, and terms of office, with a statement of any other questions which the board of directors may desire to submit to the electors of said district. Notices must be signed by the district clerk, ‘By order of the board of directors.’ Unless otherwise designated in the notice of election, the polls shall be open at one o’clock in the afternoon and close at four o’clock in the afternoon; but the board of directors may, previous to giving notice of election, determine on an hour before one o’clock, but not earlier than nine o’clock in the forenoon, for opening the polls, and for closing an hour after four o’clock, but not later than eight o’clock in the afternoon. In no case shall the polls be open before the hour named in the notice, nor kept open after the hour fixed for closing the polls, but if there is not a sufficient number of electors present at the hour named for opening the polls to constitute a board of election, it shall be lawful to open the polls as soon thereafter as a sufficient number of electors is present: Provided, That in

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cities and incorporated towns the polls shall open not later than one o'clock in the afternoon and close not earlier than eight o'clock in the afternoon."

The notice posted was as follows:

"Notice of Special School District Meeting.

"Notice is hereby given that a special meeting of the legal school electors of School District No. 15, of Skagit County, Washington, will be held at the school house in said district on the 3d day of August, 1901, beginning at the hour of 4 o'clock p. m. of said day, for the purpose of determining or voting upon the question of forming a union high school with La Conner (Dist. No. 4).

"Vote union high school—Yes.

"Vote union high school—No.

"By order of the Board of Directors.

"Dated this 23d day of July, 1901.

"Richard H. Peth,

"School District Clerk."

The provisions of the statute above quoted are mandatory, to the effect that notices must be posted, that they must designate the place and day of the election and the hours between which the polls must be kept open, and must state the question which the board of directors may desire to submit to the electors of the district. *Fractional School Dist. v. Metcalf, supra*; 21 Am. & Eng. Enc. Law, p. 794 *et seq.* The board of directors may, in their discretion, increase the time of keeping the polls open either before one or after four o'clock p. m., but the polls must be kept open in any event from one o'clock to four o'clock p. m., and this time cannot be infringed upon by any order of the board of directors. The notice in this case is in direct violation of the statute, because it provides that the polls shall not be open until four o'clock p. m., and no notice is given of the closing time. For these reasons we think the election was unauthorized.

The cause is therefore reversed, with directions to the

lower court to enter judgment in accordance with the prayer of the complaint.

FULLERTON, C. J., and DUNBAR and ANDERS, JJ.,
CONCUR.

[No. 4249. Decided January 28, 1908.]

THE STATE OF WASHINGTON, *Respondent*, v. MANUEL
DOUETTE, *Appellant*.

PERJURY — SUFFICIENCY OF INFORMATION — ALLEGATION OF JURIS-
DICTION.

Under Bal. Code, § 6857, which provides that it is sufficient in an information for perjury to set forth the substance of the controversy in respect to which the crime was committed, and in what court or before whom the oath alleged to be false was taken and that the court or person before whom it was taken had power to administer it, and under art. 4, § 6, of the constitution, which vests the superior court with original jurisdiction in cases amounting to felony, the failure of the information to specially allege that the court had jurisdiction of the cause of action in which the alleged perjury was committed would not render the information bad, where sufficient was alleged to show it was a case of felony on trial in the superior court, thereby raising a *prima facie* presumption of jurisdiction.

SAME — MATERIALITY OF FALSE TESTIMONY.

Where an information charging perjury alleges that defendant was duly sworn as a witness, and, being so sworn, "it then and there, upon the trial of said issue, became and was a material inquiry," etc., and that defendant feloniously, falsely, and contrary to such oath, deposed and swore falsely to such material facts, it sufficiently avers the materiality of the testimony and that defendant testified falsely thereto after he was sworn.

SAME — INSTRUCTIONS — DUTY OF JURY TO DISREGARD VERDICT IN
OTHER CAUSE.

The failure of the court in a perjury case to charge the jury not to consider as any evidence of the guilt of defendant the verdict and judgment included in the record of the cause in which the alleged false testimony had been given, and which

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record had been admitted in evidence in the perjury case as matter of inducement, could not be urged as error, where defendant had not requested specific instructions upon that feature of the case.

SAME — HARMLESS ERROR.

The action of the court in submitting the question of the materiality of alleged false testimony to the jury, instead of charging that it was material, was not prejudicial, where the jury by their verdict found, in effect, that the testimony was material.

SAME — ELEMENTS OF CRIME.

The failure of the court, in charging the jury, to define the crime of perjury in the statutory language was not prejudicial, where the court instructed them as to what it was necessary to find beyond a reasonable doubt in order to convict defendant, and, in so doing, pointed out all the essential elements of the crime.

SAME — WITNESSES — REFRESHING MEMORY BY REFERENCE TO RECORD.

A hotel keeper is competent to testify as to the presence of a guest in his hotel on a certain date, after refreshing his memory by reference to his register, when it appears that the entries therein were made by him in the usual way in the regular course of business and in accordance with the facts existing at the time.

SAME — EVIDENCE — RECORD IN FORMER CASE — OBJECTIONS TO RELEVANCY.

A general objection to the competency and relevancy of the testimony given in another case and offered in evidence, will not permit appellant to urge the incompetency and irrelevancy of specific portions thereof, where the testimony, as a whole, was competent, material and relevant.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM H. SNELL, Judge. Affirmed.

James F. O'Brien, for appellant.

Fremont Campbell, Prosecuting Attorney, *Charles O. Bates* and *Walter M. Harvey*, for the State.

The opinion of the court was delivered by

ANDERS, J.—The appellant was charged by an information filed by the prosecuting attorney in the superior court

in and for Pierce county with the crime of perjury, alleged to have been committed on the trial in said court of one A. P. Vance for murder in the first degree, in the month of October, 1901. A warrant was issued upon the information, and thereafter the appellant was arrested and arraigned in open court, and thereupon a motion to set aside the information and a demurrer to the information were interposed by appellant. The motion was denied, and the demurrer overruled, and exception noted, after which a plea of not guilty was entered. When the cause came on for trial by jury, the appellant interposed a challenge to the panel upon the grounds: (1) That the jurors drawn to try the case had not been properly selected by the jury commissioners, and (2) that the law of 1901, providing for the selection of jurors, was unconstitutional and void. This challenge was denied by the court, and a trial was then had, resulting in a verdict of guilty. A motion in arrest of judgment, and also a motion for a new trial, were filed, and submitted to the court, and both were denied, and thereafter appellant was sentenced to the state penitentiary for a term of ten years. To review this judgment and sentence he has brought the case here on appeal.

It is alleged that the trial court erred: (1) In denying appellant's motion to quash the information; (2) in overruling his demurrer to the information; and (3) in overruling his objection to the introduction of any testimony in this case. As each of these assignments of error is based on the assumption that the information is insufficient in law, they may properly be considered together; or, in other words, as one assignment.

It is earnestly contended by the learned counsel for appellant that the information is insufficient, for the reason that it does not aver that the crime of murder, for which Vance was tried, was committed in Pierce county,

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or within the jurisdiction of the superior court of Pierce county; and it is argued that, in the absence of such averments, it does not appear that the court had jurisdiction of the case of *State v. Vance*, in which the alleged perjury was committed. The information upon which the appellant was tried, among other things, states:

"That heretofore, to-wit, on the 21st day of October, A. D. 1901, in the superior court of the state of Washington, in and for Pierce county, held at Tacoma on said day, before William H. Snell, presiding judge of said court, a certain issue in due form and manner joined in said court between the state of Washington, aforesaid, and one A. P. Vance, upon a certain information then pending in said court against the said A. P. Vance for murder in the first degree, came on to be tried, and was, then and there, in due form of law, tried by a certain jury of the county, in due manner returned, impaneled, and sworn for that purpose, and that, at and upon the trial of said issue, Manuel Douette, of Pierce county, Washington, did then and there appear and was produced as a witness for and on behalf of the said defendant A. P. Vance, upon the trial of the said issue, and the said Manuel Douette was then and there duly sworn, as such witness as aforesaid, before Samuel Walker, who was then and there deputy clerk of the said superior court, that the evidence which he should give to the court and jury between the said state of Washington and the said A. P. Vance, the defendant, on the issue then pending, should be the truth, the whole truth and nothing but the truth, the said Samuel Walker, as such deputy clerk aforesaid, then and there having sufficient and competent power and authority to administer the said oath to the said Manuel Douette in that behalf, and the said Manuel Douette being so sworn as aforesaid, it then and there, upon the trial of the said issue, became and was a material inquiry whether the said witness, Manuel Douette, was at Eatonville, in Pierce county, state of Washington, on Monday, the second day of September, A. D. 1901, between the hours of 1 o'clock and 3 o'clock in the afternoon of said

day, and saw the defendant A. P. Vance and Charles F. Franklin, then and there fighting, and during said time then and there saw defendant, A. P. Vance, fire two shots from a revolver in his right hand, and whether the said witness, Manuel Douette, then and there also saw Charles Williams while the said defendant A. P. Vance and said Franklin were then and there fighting as aforesaid, come out and take out of his, the said Williams', left hand pocket a revolver and start towards the said Vance and Franklin and then and there rush upon the said Vance and Franklin with a gun in his, the said Williams', right hand, as though he, the said Williams, was going to strike the said Vance and Franklin, and whether the said witness, Manuel Douette, then and there also saw the said Williams bring the said revolver in his right hand down as if to strike the said Vance and Franklin with the said revolver, and whether said witness, Manuel Douette, then and there, at the time he, the said witness, says he saw the said Williams bring the said revolver down, he, the said witness, then and there heard a shot and saw the said Vance, Franklin and Williams all go down at one time; and the said witness, Manuel Douette, did then and there, upon his oath so taken as aforesaid in the said cause, feloniously, wilfully, falsely, corruptly, knowingly and contrary to such oath, depose and swear, amongst other things, in substance and to the effect following, that is to say, that he, the said witness, Manuel Douette, was at Eatonville, Pierce county, state of Washington, on Monday, the second day of September, A. D. 1901, between the hours of one and three o'clock in the afternoon of said day, and that he then and there saw two men (meaning Vance and Franklin) scuffling or wrestling, and that he first thought they were skylarking on the porch of a store, and that one of the said men seemed to be pushing the other man off of the porch, and that while he, the witness Manuel Douette, was so watching the said two men, he saw a man (meaning Charles Williams) come out as if he came out of the store, and that just as the man came out it seemed like he took out a revolver from his left hand side and started towards the fellows who were skylarking

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on the porch (meaning Vance and Franklin), and just at that time he saw the men who were skylarking (meaning Vance and Franklin) fire two shots; that he, the said witness, Manuel Douette, also then and there saw that it was the man on the opposite side of him (meaning Vance) who fired the said two shots from his right hand, and that he, the said witness, Manuel Douette, then and there saw the man who came out and took the revolver from his left hand pocket (meaning Charles Williams) rush on the two men (meaning Vance and Franklin) with a gun in his right hand as if he was going to strike them (meaning Vance and Williams), and that the said man (meaning Charles Williams) brought it down (meaning the gun) as if he was going to strike them (meaning Vance and Franklin), and that as his hand was going down (meaning the hand of Williams) he, the said witness Manuel Douette heard a shot, and that just at that moment he saw them all (meaning Vance, Franklin and Williams) go down at one time. Whereas, in truth and in fact, the said witness Manuel Douette was not at Eatonville, Pierce county, state of Washington, on Monday, the second day of September, A. D. 1901, between the hours of one and three o'clock in the afternoon of said day, and the said witness, Manuel Douette, did not then and there see two men (meaning Vance and Franklin) or any other men scuffling or wrestling on the porch of a store or at all, or see one of said men seeming to push the other man off the porch, and the said witness, Manuel Douette, did not then and there, or at all, see a man come out as if he came out of the store and take a revolver out of his left hand pocket or out of any pocket, and start towards the two men (meaning Vance and Franklin), and the said witness, Manuel Douette, did not then and there see the two men (meaning Vance and Franklin) or either of them fire two shots, and the said witness, Manuel Douette, did not then and there or at all see a man who seemed to come out of the store (meaning Williams) and with a gun in his right hand rush on the two men (meaning Vance and Franklin) and bring the revolver down as though he was going to strike the two men (meaning Vance and Frank-

lin), and the said witness, Manuel Douette, did not then and there at that moment, or at all, hear a shot or see the three men (meaning Vance, Franklin and Williams) go down at one time, or at all. And so the said F. Campbell, prosecuting attorney aforesaid, says that the said witness, Manuel Douette, feloniously, wilfully, falsely, corruptly, knowingly and to such oath as aforesaid, in manner and form aforesaid, did then and there commit the crime of perjury, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Washington."

It may be admitted that, under the technical rules of pleading at common law, this information would be defective and insufficient. But the common-law forms of pleading have been changed and simplified by statute in this state, and it is not necessary here to specifically allege that the court had jurisdiction of the cause of action in which the alleged perjury was committed. *Commonwealth v. Knight*, 12 Mass. 274 (7 Am. Dec. 72); *State v. Newton*, 1 G. Greene, 160 (48 Am. Dec. 367).

"A direct allegation of authority to administer the oath is sufficient to show the jurisdiction of the court or officer." 16 Enc. Pl. & Pr., 326.

It is provided in § 6857 of Bal. Code that:

"In an indictment or information for perjury, or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the crime was committed, and in what court or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment or information need not set forth the pleadings, record or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed."

It is apparent that under the provisions of this section

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of the statute it is sufficient, so far as the question of jurisdiction is concerned, to set forth in the information in what court or before whom the alleged false oath was taken, and that the court or person before whom it was taken had authority to administer it. And an examination of this information will disclose that it contains all the averments necessary under the statute. It alleges, in substance, that upon the trial by a jury of the case of *State v. Vance* for murder in the first degree, in the superior court of Pierce county, the appellant was then and there duly sworn as a witness by Samuel Walker, who was then and there deputy clerk of said court, and had competent and sufficient power and authority to administer said oath in that behalf. The information does not expressly allege that the superior court of Pierce county had jurisdiction of the case in which the alleged perjury was committed, but that the court had in fact jurisdiction of the *Vance Case* is, we think, necessarily implied from the averments that it was a case of felony, and was tried in that court. Our superior courts are vested by the constitution with jurisdiction "in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law." Constitution, art. 4, § 6. The averment in the information that the oath alleged to be false was taken in a certain superior court shows *prima facie* that the court had jurisdiction of the proceedings in which the oath was administered. The question here under consideration was presented to and determined by the supreme court of Colorado, in *Thompson v. People*, 26 Colo. 496 (59 Pac. 52), under a statute similar in substance to ours. And in that case the court, after quoting the statute, said:

"It will be observed that by the provisions of this section it is sufficient to aver in the information that the court or authority before which the oath was taken had full

power to administer the same. This section is substantially the same as the statute 23, George II., Chap. 11. Under that statute the English decisions are that it is only necessary to state the substance of the offense, the name of the court, and aver the court's authority to administer the oath. To the same effect are the decisions in this country, under similar statutes. . . . While it is true that the information does not contain an express averment that the district court of El Paso county had jurisdiction of the case in which the alleged false testimony was given, it does aver that upon the trial of a certain criminal case, of which that court *prima facie* had cognizance, the plaintiff in error was duly sworn as a witness by the deputy clerk, and that he had sufficient authority to administer the oath. We think, therefore, that in this particular the information not only conforms to the requirements of the statute, but by necessary implication states that the proceeding in which the oath was administered was one over which the district court had jurisdiction. Nor is the information defective because of the failure to set forth how or in what way the evidence alleged to be false was material to the issue. It is well settled that it is sufficient if its materiality appears either from the facts alleged, or by direct averment."

The objection that it does not appear from any averment in the information that the superior court of Pierce county had jurisdiction of the case of *State v. Vance* is not tenable, and the court below committed no error either in denying the motion to set aside the information or in overruling the demurrer to the information interposed by the appellant.

It is next objected that it does not appear by any allegation in the information that the matter alleged to be material was material at the time the defendant, Manuel Douette, was called to testify as a witness. As we have seen, the information alleges that "the said Manuel Douette was then and there duly sworn as such witness as

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aforesaid, . . . and, the said Manuel Douette being sworn as aforesaid, it then and there, upon the trial of said issue, became and was a material inquiry," etc. And it is insisted, in effect, by counsel, that, for aught that appears from the above averment, the testimony of the appellant may have become material, if at all, after he had testified and left the witness stand. In support of the proposition that the materiality of the alleged false testimony does not sufficiently appear from the averments in the information, appellant cites and relies on the case of *People v. Collier*, 48 Am. Dec. 699. In the opinion of the court in that case it is stated that the indictment alleged, in substance, that a complaint was made against one Allen Boyce, charging him with having stolen a bay horse and a mule, the property of one Benjamin F. Collier, the defendant; that the matter came on to be heard and determined and that the defendant was, in due form of law, sworn as a witness. The only allegation in the indictment as to the materiality of the testimony given by the defendant was as follows: "And then and there, upon the hearing of said complaint, it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to and stated by the said Benjamin L. Collier, upon his oath." And the court very properly held in that case that the indictment failed to show that the evidence given by the witness was material to the matter there in issue at the time the evidence was given, or that the defendant gave any evidence after it became material. While the doctrine announced in that case is undoubtedly correct, it would seem to be inapplicable to the case at bar, for the reason that it is here alleged, in effect, that the testimony was material to the issue then pending in court, and that the defendant (appellant) testified falsely after he was sworn. We think the materiality of the testimony

was sufficiently alleged. Of course, the immediate issue in the case in which it is alleged the appellant testified falsely was whether Vance was guilty of murder in the first degree. Witnesses were sworn on behalf of the state, who testified that they saw Vance kill one Charles Franklin by shooting him with a revolver at Eatonville, in Pierce county, Washington, on September 2, 1901, and that no other person discharged or had a revolver or pistol on that occasion. And testimony to the same effect was properly given on the trial of this case, under the averments in the information, for the purpose of showing how the testimony given by appellant became and was material upon the trial of the case of State against Vance. While the materiality of the testimony alleged to be false must be shown in the indictment or information, either by direct averment or by stating facts which render the materiality of the testimony apparent (16 Enc. Pl. & Pr., 343-344) it is not necessary, to constitute perjury, that the witness should swear falsely and corruptly to the immediate fact in issue, for perjury may be committed by falsely and corruptly swearing to any fact or circumstance which legitimately tends to prove or disprove such fact, or which has the effect to strengthen or corroborate the testimony upon the main fact. *Dilcher v. State*, 39 Ohio St. 130; *Thompson v. People*, *supra*. It can hardly be disputed that the testimony alleged to have been given by appellant upon the trial of the Vance case tended to disprove the fact immediately in issue, namely, whether or not Vance was guilty of the crime with which he was charged. Under the authorities above cited, the alleged testimony was certainly material.

At the trial of this case the court admitted in evidence the trial record of the case of State v. Vance, including the verdict and judgment. It is conceded by counsel for

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appellant that it was proper and necessary to show by the record that an information was filed, and that a plea of not guilty was entered; that the trial proceeded after the jury was impaneled, and that witnesses were sworn. But he earnestly insists that the court erred in admitting the verdict in evidence, and especially, after having admitted it, in failing to instruct the jury that they should not consider it as any evidence of the guilt of the defendant. The cases cited by appellant in support of the contention under consideration do not hold that, in prosecutions for perjury, it is improper to receive in evidence the record of the trial in which the perjury is alleged to have been committed. On the contrary, they announce the doctrine that such record is admissible in evidence as inducement, or, in other words, for the purpose of showing that the alleged perjury was committed on the trial of the cause alleged in the indictment or information; but that it is the duty of the court to tell the jury that the judgment cannot be considered as proof of the perjury, or the falsity of the statement assigned for perjury, and that for a failure to so instruct the jury the judgment will be reversed. *Kitchen v. State*, 26 Tex. App. 165 (9 S. W. 461). See, also, *Davidson v. State*, 22 Tex. App. 372 (3 S. W. 662), and *Hutcherson v. State*, 33 Tex. Cr. 67 (24 S. W. 908). These are Texas cases, and the decisions therein were fully warranted by a statute of that state which provides that in cases of felony the judge must charge the jury, and must "distinctly set forth the law applicable to the case, whether asked or not." See Thompson, Trials, § 2340, and note.

But the learned counsel for the state contend that the rule announced in those cases as to the duty of the court in charging the jury is not in harmony with that generally adopted by the courts in this country, or with the previous decisions of this court. And we think this contention is

amply supported by authority. The court was not requested to charge the jury not to consider the verdict in the Vance case as evidence against the appellant, and, that being so, the mere failure of the court to so charge affords no sufficient reason for reversing the judgment. The general rule as to specific instructions is stated in § 2341 of Thompson on Trials, as follows:

“It is, then, a general rule of procedure, subject, in this country, to a few statutory innovations, that mere *non-direction*, partial or total, is not ground of new trial, unless specific instructions, good in point of law and appropriate to the evidence, were requested and refused. A party cannot, by merely excepting to a charge, make it the foundation for an assignment of error, that it is indefinite or incomplete. The rule rests upon the soundest foundation. The facts of the case come to the mind of the judge as matters of first impression, and it will often be extremely difficult for him, in the short time allowed for a trial before a jury, and in the midst of such a trial, to prepare a series of instructions applicable to all the hypotheses presented by the evidence. On the other hand, counsel are presumed to have studied their case beforehand; to come to the court with a fair understanding of the facts which will probably be proven, and with a full knowledge of the law applicable to these facts. It is, therefore, their duty to give attention to the charge of the judge, and if, in their opinion, he omits to give direction as to the law applicable to any essential feature of the evidence, to call his attention to the omission and to request appropriate supplementary instructions; and when they fail thus to call his attention to something which he may fairly be supposed to have omitted from inadvertence, they ought not to be allowed to complain of the omission in an appellate court. A rule which would allow them to do so would be extremely inconvenient. It would multiply new trials and reversals, and often on grounds which have no connection whatever with the merits.”

Our statute provides generally that in charging the

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jury the court shall state to them all matters of law necessary for the information of the jury in finding a verdict. (Bal. Code, § 4993; 2 Hill's Code, § 354.) And this court has held, under that statute, that, if counsel desires specific instructions upon a particular feature of the case as presented by the evidence, he should submit a request therefor at the proper time. *Wilson v. Waldron*, 12 Wash. 149 (40 Pac. 740).

We have also repeatedly held that, if an instruction is too general in its terms, it is the duty of counsel to ask the court to make it more specific, instead of merely objecting to it. See *Cogswell v. West St., etc., Ry. Co.*, 5 Wash. 46 (31 Pac. 411); *Enoch v. Spokane Falls & N. Ry. Co.*, 6 Wash. 393 (33 Pac. 966); *Duggan v. Pacific Boom Co.*, 6 Wash. 596 (34 Pac. 157, 36 Am. St. Rep. 182); *Brown v. Porter*, 7 Wash. 327 (34 Pac. 1105); *Gottstein v. Seattle Lumber, etc., Co.*, 7 Wash. 424 (35 Pac. 133). And, when not controlled by a mandatory statute, such as that involved in *State v. Myers*, 8 Wash. 177 (35 Pac. 580), this court has uniformly ruled, in effect, that an appellant cannot avail himself of incomplete instructions, unless he has first requested the court to make its instructions more full and complete, and it has refused to do so. *Box v. Kelso*, 5 Wash. 360 (31 Pac. 973); *McQuillan v. Seattle*, 13 Wash. 600 (43 Pac. 893).

The appellant, in the court below, challenged the panel of jurors from which the jury was drawn to try this case, on the ground that the jury was not properly selected, and more especially on the ground that the law of 1901 regulating the selection of jurors was unconstitutional and void. The court denied the challenge, and this ruling of the court is assigned as error. The identical questions here raised and discussed by counsel were presented to this

court, and upon careful consideration were determined adversely to the contention of appellant, in the late case of *State v. Vance*, 29 Wash. 435 (70 Pac. 34); and we do not deem it necessary to repeat what was there said upon the subject.

It is clearly shown by the evidence in this case that some time after the middle of August, 1901, the appellant was employed by one Herman Klaber to go into the country north of Seattle, embracing British Columbia as well as the northern part of this state contiguous to Puget Sound, and hire Indians to work in Mr. Klaber's hop yards at Puyallup, and that in pursuance of such employment he at once left Tacoma for the purpose above stated. On August 24, 1901, the appellant entered his name in the register of the Commercial Hotel at Steveston, B. C., of which one Rudolf Wolff was manager, and on August 30th he addressed a letter, dated at Steveston, to Mr. Klaber at Tacoma, stating that he had succeeded in getting over five hundred hop pickers; that some of them had already left there, and were coming in canoes; that others would leave the day the letter was written and the day after, and that many of them would come by steamer; that he would be with them until they started, and asking Mr. Klaber to look after them when they arrived at Tacoma. This letter was received by Klaber at Tacoma on September 2, 1901. On September 4, 1901, appellant sent a telegram to Klaber from Seattle, stating that he would arrive at Tacoma by steamer at twelve o'clock with forty pickers. And some time after twelve o'clock on said day appellant met Mr. Klaber at Tacoma, and requested the latter to prepare and send, in appellant's name, a telegram to a Cowegan Indian at Anacortes, the appellant saying at the time that he had just returned from down the Sound, or words to that effect. The register of the Commercial Hotel was pro-

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duced in court by Mr. Wolff, who was sworn as a witness for the prosecution, and identified by him. This witness testified that appellant himself registered his name in the hotel register on August 24, 1901, and the signature of the appellant, together with the date, and the number of the room he occupied in the hotel, was offered by the prosecution and received in evidence. A similar entry in the register, under date of August 29, 1901, made by the witness in the presence of appellant, was also offered and received in evidence. The other entries of appellant's name upon the register under dates of August 30th and 31st and September 1st, 1901, were not admitted in evidence by the court for the reason that they were made by the witness Wolff when the appellant was not personally present. This witness testified that he placed appellant's name on the register at the times therein specified, and would not have done so if appellant had not then been a guest at his hotel, but that he had no recollection of his being there on August 30th and 31st and September 1st, independent of the register, to which he was permitted to refer. After examining the book, the witness testified that appellant stayed at said hotel in Steveston on the days specified in the register. The appellant claims that the court erred in admitting this testimony over his objection, but we perceive no error in the ruling of the court in that regard. The entries made by the witness showing the appellant occupied room 4 of the Commercial Hotel on August 30th and 31st and the night of September 1, 1901, were shown by him to have been made in the usual way in the regular course of business, and in accordance with the facts existing at the time. The evidence, we think, was clearly admissible. Stephen, Evidence (Chase's 2d ed.), p. 91. See, also, 1 Greenleaf, Evidence (16th ed.), § 439 b; Jones, Evidence, § 884.

It is next contended that the court erred in permitting all of the testimony of appellant in the case of *State v. Vance* to be given to the jury in this case. This testimony was identified by the stenographer who reported the evidence in the *Vance* case, and it was agreed by counsel that a transcript of the evidence might be read to the jury, subject to the objection of counsel for appellant to its admission on the ground of incompetency. While this testimony was being read to the jury, no objection was made to any specific part thereof, and it therefore follows that appellant is not now in a position to complain of its admission. The appellant's objection simply challenged the competency and relevancy of the testimony as a whole, and he cannot be permitted in this court to avail himself of objections which should have been interposed in the court below. Moreover, it is evident that a part, if not all, of appellant's testimony was not only competent and material, but relevant to the issue then in question; and, that being so, a general objection was insufficient.

In charging the jury the learned judge submitted the materiality of the alleged false testimony to the jury. We are fully convinced that the testimony alleged in the information to be false was material; and, according to the weight of authority, it was the province of the court to charge the jury, as matter of law, that it was material. But, inasmuch as the jury, by their verdict, found, in effect, that the testimony was material, the error in submitting the question to them in no way prejudiced the rights of the appellant.

"If the court had charged that it was material, the jury would have been bound to have followed such instruction and found accordingly. Without such instruction, they have thus found. The result is the same, either way. How then has the defendant been prejudiced?" *State v. Lewis*, 10 Kan. 157.

See, also, *Montgomery v. State*, 40 S. W. 805; *Thompson v. People*, *supra*.

The appellant also complains of the following portion of the court's charge to the jury:

"In order to convict the defendant, the jury must be satisfied beyond a reasonable doubt: First, That the action was pending in this court wherein the State of Washington was prosecuting A. P. Vance upon an issue joined therein on the charge of murder in the first degree. Second, That this defendant upon the trial of said cause was sworn as a witness in said cause before Samuel Walker, who was then and there deputy clerk of said superior court, that the evidence which he, the said Manuel Douette, would give to the court and jury in the issue joined in said cause between the State of Washington and said A. P. Vance should be the truth, the whole truth, and nothing but the truth, and that he, the said Samuel Walker, as such deputy clerk as aforesaid, then and there had authority and power to administer the said oath to said Manuel Douette, and that the oath was taken by said Manuel Douette before giving his alleged testimony, if you find he did so testify in said cause. Third, That after having been first sworn as a witness in said cause he did testify to the statements or testimony contained in the information. It is not necessary, however, that they should be proved in the precise words alleged in the information; it is sufficient if they are substantially proven in language and effect as therein alleged. Fourth, That the statements so testified to by the said Manuel Douette, if you find he did so testify, were false and untrue, and that the defendant, Manuel Douette, at the time he gave such testimony wilfully gave the same, knowing the same to be false and untrue."

The objection to the first subdivision of this instruction is that there was nothing in the evidence upon which to base it, and to the third that the court therein, in effect, told the jury that the defendant was guilty if the facts alleged in the information were proven, and thereby in-

vaded the province of the jury. These objections, we think, are quite unsubstantial. Nor was the appellant, in our judgment, prejudiced in the least degree by the failure of the court to define the crime of perjury in the statutory language. The court told the jury what was necessary for them to find beyond a reasonable doubt in order to convict the appellant, and in so doing pointed out all the essential elements of the crime.

We have carefully considered all of the alleged errors, and have failed to discover anything in the record which would justify a reversal of the judgment, and it is therefore affirmed.

FULLERTON, MOUNT, DUNBAR and HADLEY, JJ., concur.

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[No. 4413. Decided January 28, 1903.]

R. NOBLETT, *Respondent*, v. CHRIST BARTSCH *et al.*, *Appellants*.

MALICIOUS PROSECUTION — PROBABLE CAUSE — BURDEN OF PROOF —
DISCHARGE BY COMMITTING MAGISTRATE.

The fact that plaintiff in an action for malicious prosecution had been discharged from a criminal charge without a trial upon the merits, while sufficient to make a *prima facie* case, would not shift the burden of proof in the action for damages to the defendants.

SAME — LIABILITY OF CO-PARTNERS.

The fact that plaintiff was maliciously prosecuted upon a charge of larceny of partnership goods would not raise a presumption that all the partners participated in his prosecution, but in order to render all the partners liable proof of their complicity in the prosecution would be necessary.

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Reversed.

Jan. 1903.] Opinion of the Court.—FULLERTON, C. J.

John E. Humphries and Harrison Bostwick for appellants.

The opinion of the court was delivered by

FULLERTON, C. J.—This is an action for malicious prosecution. The respondent was arrested on a warrant issued by a magistrate charging him with the crime of bringing stolen property into this state from a foreign country, and confined in jail for about one week's time. At the time fixed for the preliminary hearing he was discharged at the request of the prosecution without examination or any evidence being brought against him. The property which he was charged with having brought into the state was alleged to be the property of a partnership composed of the appellants, and to have been stolen by one G. E. Daniel, at Dawson, in the Northwest Territory, where Daniel had been connected in business in some form with the partnership. The respondent alleged in his complaint that the prosecution was instituted maliciously and without probable cause, and that he was damaged thereby in the sum of fifty thousand dollars. The jury returned a verdict in his favor for one thousand dollars, and it is from the judgment entered thereon that this appeal is prosecuted.

The court gave to the jury the following instructions:

"2. In an action for malicious prosecution, the fact that the plaintiff was discharged by the examining magistrate without hearing on the merits throws the burden of proving probable cause on the defendants."

"4. The dismissal of the prosecution alleged in the complaint without a trial is competent not only for the purpose of showing an end of the prosecution, but in addition it establishes a *prima facie* case of want of probable cause, and throws upon the defendants the burden of proving that there was a want of probable cause for the prosecution of the plaintiff."

"8. You are instructed further that the presumption exists that there was probable cause, and that the defendants acted without malice and in good faith in instituting the criminal prosecution, and that presumption stands until the plaintiff shows by a preponderance of the testimony that there was a total absence of probable cause, and that the prosecution was malicious; and if the plaintiff has failed to prove to your satisfaction, by a preponderance of testimony, the total lack of probable cause, and malicious institution of prosecution, then your verdict must be for the defendants. In connection with this instruction, however, I charge you that proof that the plaintiff was discharged at the preliminary hearing without a trial on the merits constitutes *prima facie* proof of the want of probable cause, and throws the burden of disproving it upon the defendants."

From these instructions it will be observed that the trial court took the view that the showing on the part of the respondent that the prosecution against him was voluntarily dismissed cast the burden of showing probable cause therefor upon the appellants. Assuming that a voluntary dismissal is equivalent to a discharge by the committing magistrate, there are cases which maintain this view. *Hidy v. Murray*, 101 Iowa, 65 (69 N. W. 1138); *Barhight v. Tammany*, 158 Pa. St. 545 (28 Atl. 135, 38 Am. St. Rep. 853); *Bigelow v. Sickles*, 80 Wis. 98 (49 N. W. 106, 27 Am. St. Rep. 25); *Bornholdt v. Souillard*, 36 La. An. 103. On the other hand, there are cases which hold that a discharge by a committing magistrate is not even evidence of want of probable cause. *Stone v. Crocker*, 24 Pick. 84; *Lancaster v. Langston*, 36 S. W. 521; *Israel v. Brooks*, 23 Ill. 575; *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493 (16 Atl. 554); *Heldt v. Webster*, 60 Tex. 207; *Apgar v. Woolston*, 43 N. J. Law, 57. Others, again, announce the rule that the showing of a discharge by the committing magistrate is evidence of

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want of probable cause, sufficient to make a *prima facie* case, but does not shift the burden of proof. Cooley, Torts, 184; 3 Lawson's Rights, Rem. & Prac., § 1084; *Eastman v. Monastes*, 32 Ore. 291 (51 Pac. 1095, 67 Am. St. Rep. 531); *Scott v. Wood*, 81 Cal. 398 (22 Pac. 871); *Vinal v. Core and Compton*, 18 W. Va. 1; *Rankin v. Crane*, 104 Mich. 6 (61 N. W. 1007). This latter is, we conceive, the correct rule. Generally the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and there is no apparent reason for making an exception in favor of actions for malicious prosecutions, more particularly as to the issue now in consideration. The very gist of an action for malicious prosecution is want of probable cause. The truth of other material allegations, such, for example, as malice, may be inferred from proof of want of probable cause, but this allegation, being of the very substance of the issue, must be substantially and expressly proved, and is never inferred or implied from the proof of anything else. We think, therefore, that the burden of proving this issue remained upon the respondent throughout the trial, and that the court erred in charging the jury to the contrary.

The court refused to charge the jury to the effect that one partner is not liable for a malicious prosecution instituted by his co-partner, unless he advises, directs, or participates therein, even though the prosecution be purported to be instituted for some wrongful or criminal act with relation to property belonging to the firm. This was error. The rule is that a partner, as such, is not liable for a malicious prosecution instituted by his co-partner unless committed in the course of, and for the purpose of transacting, the partnership business. As a prosecution for larceny is not within the scope of a business of a

mercantile partnership (the business engaged in by the appellants), there could be no presumption of participation by all of the partners, and it was necessary that this fact be proven. *Marks & Co. v. Hastings*, 101 Ala. 166 (13 South. 297); *Gilbert v. Emmons*, 42 Ill. 143 (89 Am. Dec. 412); *Rosenkrans v. Barker*, 115 Ill. 331 (8 N. E. 93, 56 Am. Rep. 169). The evidence, however, was conflicting on the question whether or not all of the appellants participated in the prosecution, and the jury should have been instructed on both sides of the question.

It is contended that the court erred in refusing to grant a nonsuit in favor of all of the appellants. This is based on the claim that the appellants fully and fairly stated all of the facts of their case to the prosecuting attorney of King county, and that the prosecution was instituted with his consent and advice. The trial court took the view that there was such a substantial dispute in the evidence as to make this question one for the jury, and instructed them on that theory. A perusal of the record inclines us to the belief that the court correctly interpreted the evidence, and hence we find no error in its refusal to grant a nonsuit.

The judgment is reversed and the cause remanded for a new trial.

DUNBAR, MOUNT, HADLEY and ANDERS, JJ., concur.

[No. 4448. Decided January 29, 1903.]

UNION FEED COMPANY, *Appellant*, v. PACIFIC CLIPPER
LINE, *Respondent*.

CARRIERS — ACTION FOR LOSS OF GOODS — TITLE OF PLAINTIFF.

In an action to recover the value of hay lost through the negligence of a carrier, while stored in its dock awaiting ship-

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Opinion Per Curiam.

ment, plaintiff's ownership, though denied, is sufficiently established, where the evidence shows that plaintiff employed a third party to purchase the hay for it and deliver same at the dock to be shipped plaintiff, who had agreed to pay such third party a stipulated price per ton, when it appears that the plaintiff and such third party, between themselves, always treated the title to the hay as being in plaintiff.

Appeal from Superior Court, King County. — Hon. GEORGE MEADE EMOY, Judge. Reversed.

Allen, Allen & Stratton, for appellant.

Charles F. Munday, for respondent.

PER CURIAM.—The appellant brought this action to recover from the respondent the value of 62½ tons of compressed wheat hay which it alleges belonged to it, and was lost through the carelessness and negligence of the defendant. The respondent put in issue both the allegation of ownership and the allegation of negligence. At the conclusion of the trial the court sustained a challenge to the sufficiency of the evidence, and directed a judgment for the respondent, on the ground that the evidence was insufficient to show title in the appellant to the property sued for. While the evidence on this branch of the case was not very full, it tended reasonably to show that the appellant was doing business in Honolulu; that its manager came to Seattle, and sought to buy of Lilly, Bogardus & Co. some two hundred and fifty tons of wheat hay,—a kind that was very little used in the local market, and which Lilly, Bogardus & Co. did not have in stock. The manager was informed of these facts, but was told that the hay could be procured from the farmers in the eastern part of the state. The manager then directed Lilly, Bogardus & Co. to buy the hay for the appellant, double compress it, and deliver it at the Arlington dock,—the dock of the respondent,—with directions to ship it to the

appellant, at Honolulu; agreeing that the appellant would pay them for the hay at the rate of fifteen dollars per ton. The hay was purchased, compressed, and delivered at the Arlington dock, and all but 62½ tons,—the hay in question here,—shipped to the appellant. The amount last mentioned was lost while in the respondent's possession by the falling in of the dock on which it was stored. Advancements towards the agreed price were made by the appellant to Lilly, Bogardus & Co. prior to the loss, and subsequent thereto the appellant paid to them the balance due for all of the hay so delivered,—that which was lost as well as that which was shipped,—also certain storage charges advanced by Lilly, Bogardus & Co. to the respondent, and afterwards instituted this action.

While the argument of counsel has taken a wide range, it seems to us that the question involved is a simple one, and comparatively easy of solution. The respondent is, of course, answerable, if answerable at all, only to the person who has suffered the injury caused by the loss of the property, and can for that reason insist that the person who seeks to charge it with that loss show that he is the sufferer, even though such showing requires that he prove title in himself to the property. But where proof of title is required, it can be proven in the same manner it is proven where the contest is between individuals, each of whom is claiming the title. If there is a contract between them, under which the property was procured, not only the contract, but the construction the parties have put upon it, their mutual dealings thereunder, and the several acts of each with reference to the property, may be considered in determining to whom the property belongs; and when the title must rest in one of two persons, evidence which would determine the title as between them will determine it as between one of them and a stranger assert-

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ing it to be in the other. Here the title to the property at the time of its loss was either in the appellant, or it was in Lilly, Bogardus & Co. On this point the evidence makes no question. It shows, also, that as between these parties there never was any dispute as to which of them owned the property. From the beginning they have construed their contract as one vesting title to the property procured thereunder in the appellant, and have settled their mutual dealings concerning it on that basis. As between themselves, therefore, they are estopped to deny that the title was at any time subsequent to its procurement in any one other than the appellant, and it must follow that they could not assert the contrary as against any one else. The appellant being the sufferer because of the loss of the property, and the one who must bear that loss, if the recovery therefor cannot be had of the respondent, we think it clear that the evidence was sufficient on the question of title to warrant a recovery, and that the court erred in ruling to the contrary.

The respondent insists that the judgment of the lower court was right on another ground, viz., that the evidence failed to show actionable negligence on the part of the respondent. While it may be doubted whether this question is before us for review, we have examined the evidence touching the point, and find it sufficient to warrant the court in submitting the question to the jury.

The judgment is reversed, and the cause remanded for a new trial.

[No. 4587. Decided February 7, 1903.]

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34 58THE STATE OF WASHINGTON *on the Relation of John Nelson et al.*, v. SUPERIOR COURT OF KING COUNTY.

CERTIORARI — REMEDY BY APPEAL — APPROPRIATION OF LAND FOR DRAINAGE PURPOSES.

Certiorari will not lie to review errors of the trial court in assessing damages and benefits to lands by reason of the construction of a drainage system, since it is provided by Laws 1901, p. 181, § 1, that appeal in such cases "shall bring before the supreme court the propriety and justice of the amount of damage or assessment of benefits," thereby affording a review of all errors; and the adequacy of the remedy by appeal would not be affected by the fact that the lien of the judgment would attach pending the determination of the appeal.

Original Application for Certiorari.

Root, Palmer & Brown, Henry B. Madison, Smith & Cole and John P. Hartman, for relators.

Ballinger, Ronald & Battle, for respondent.

PER CURIAM.—Petition for a writ of certiorari to review errors of the trial court in assessing damages and benefits to certain lands for the construction of a drainage system under the act of March 20, 1895 (Laws 1895, p. 271). All the errors alleged in the petition for the writ are errors which could have been reviewed by this court upon appeal. They go either to the sufficiency of the petition and complaint in the original action, the regularity of the proceedings thereunder, the introduction of evidence, the sufficiency of the evidence, or the justness of the amount of damages awarded.

It is alleged in the petition that an appeal in this case would not be adequate because the amount provided for in the decree would become a lien and cast a cloud upon

the title of the property affected, and that pending the appeal, which could not be determined for several months, the petitioners would be irreparably damaged. The act under which these proceedings were instituted and prosecuted provides (§ 1, Laws 1901, p. 181):

“ . . . Every person or corporation feeling himself or itself aggrieved by any judgment for damages or any assessment of benefits provided in this act, may appeal to the supreme court of the state within thirty days after the entry of the judgment, and such appeal shall bring before the supreme court the propriety and justness of the amount of damage or assessment of benefits in respect to the parties to the appeal.”

The term “propriety and justness of the amount of damage” must mean that the court may review the propriety of the award as well as the justness of the amount. To determine these questions necessarily involves the review of all errors which at the trial have affected either the propriety or the justness of the amount of the award. This court has repeatedly held that the writ will not issue where there is an adequate remedy by appeal. *State ex rel. Carrau v. Superior Court*, 30 Wash. 700 (71 Pac. 648).

The adequacy of the remedy is not affected by reason of the fact that the lien of the judgment may attach pending a determination of the appeal in this court. All judgments become liens on real estate when entered, and, if appeal is not adequate in cases of the kind at bar, it is inadequate in any case where judgments are entered and appealed from.

We think the petitioners had a plain and adequate remedy by appeal, and the writ is therefore denied.

[No. 4263. Decided February 10, 1903.]

BAY VIEW BREWING COMPANY, *Respondent*, v. PETER
GRUBB, *Appellant*.

LIMITATION OF ACTIONS — WAIVER OF OBJECTION.

Where a defendant did not raise the objection, either by demurrer or answer, that the cause of action was barred by the statute of limitations, until after trial and judgment and the case came back for retrial after reversal on appeal, the objection must be deemed as waived, under Bal. Code, § 4911, which provides that "if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same."

WITNESSES — TRANSACTIONS WITH DECEASED PARTNER.

Under Bal. Code, § 5991, which provides that in an action where the adverse party derives right or title by, through, or from any deceased person, then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with such deceased person, evidence of a transaction had with a deceased member of a partnership is inadmissible, when the surviving partner was not present nor had any personal knowledge of the transaction.

SAME — ACTION ON PROMISSORY NOTE — TESTIMONY AS TO ALTERATION — COMPETENCY.

The indorser of a promissory note cannot testify that a waiver of demand and notice was not on the back of the note when he indorsed it, where action is brought upon the note by the successor in interest of a deceased person with whom the transaction had been had.

Appeal from Superior Court, Clallam County.—Hon.
OLIVER V. LINN, Judge. Affirmed.

Trumbull & Trumbull, for appellant.

Preston & Embree, for respondent.

The opinion of the court was delivered by

MOUNT, J.—This was an action brought upon two promissory notes. One of these notes was executed and

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delivered by defendant to Hemrich & Co., a partnership consisting of Andrew Hemrich, John Hemrich, and Fred Kirschner, and by the partnership transferred to the plaintiff. The other note was executed and delivered by John Nelson and Mary Nelson, his wife, to defendant, and by him indorsed to the partnership above named, which in turn transferred it to the plaintiff. At the time the action was begun, John Hemrich and Fred Kirschner, two of the partners above named, were dead, and Andrew Hemrich, the surviving member of the partnership above named, was president of the plaintiff corporation. The cause was before this court upon a former appeal. 24 Wash. 163 (63 Pac. 1091). Prior to that appeal no defense whatever was made to the first cause of action, being the cause of action upon the note first above described. When the cause was sent back for a new trial, the defendant asked leave of the court to withdraw his answer to the second cause of action and file a demurrer to the first cause of action. This leave was granted, and defendant thereupon filed a demurrer to the first cause of action, upon the ground: (1) That it was barred by the statute of limitations, and (2) that it did not state facts sufficient to constitute a cause of action. The second ground of demurrer was not, and is not now, insisted upon. The demurrer was overruled, and defendant answered to the second cause only. This answer consisted of a denial of all the allegations of the second cause, and affirmative matter; which affirmative matter was, on motion of the plaintiff, stricken out. Upon a trial judgment was rendered for the plaintiff for the full amount prayed, and defendant appeals.

Several errors are alleged. We think but two of them require notice.

1. It appeared on the face of the complaint that the

first cause of action was barred by the statute of limitations, because the complaint was not filed within six years from the time the cause of action accrued. *Cresswell v. Spokane County*, 30 Wash. 620 (71 Pac. 195). Respondent insists that appellant, under the statute, waived this ground of demurrer, and cannot urge such error at this late day. This contention must be sustained. The statute (Bal. Code) provides as follows:

"§ 4907. The defendant may demur to the complaint when it shall appear upon the face thereof either,—
. . . . 7. That the action has not been commenced within the time limited by law."

"§ 4909. When any of the matters enumerated in section 4907 do not appear upon the face of the complaint, the objection may be taken by answer."

"§ 4911. If no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting always the objection that the court has no jurisdiction, or that the complaint does not state facts sufficient to constitute a cause of action, which objection can be made at any stage of the proceedings, either in the superior or supreme court."

The objection that the action had not been commenced within the time limited by law clearly appeared upon the face of the complaint. When the defendant appeared in the case, no objection was taken to the first cause of action by either demurrer or answer. It was confessed thereby the plaintiff was entitled to judgment, and judgment was entered. The cause thereafter came to this court upon errors assigned in the trial of the second cause of action. No objection was taken to the first cause. If the statutes above cited are to be given any force whatever, certainly the defendant waived the objection which he now tries to make; and, if the court had any discretion to allow the answer to be withdrawn and the demurrer

filed on the ground that the action was barred by the statute of limitations, it was an abuse of that discretion to permit the demurrer to be filed upon that ground after trial and judgment, and after the cause had been appealed to this court upon other questions.

2. On the trial the plaintiff offered in evidence the note with the indorsement described in the second cause of action, and, after he had identified the signature of the defendant to the indorsement, it was received in evidence. The indorsement on the note was as follows: "Demand and notice waived. Peter Grubb." When defendant was on the stand, he admitted his signature to the indorsement, and was asked this question: "At the time you first put your name on the back of the note, were the words, 'Demand and notice waived,' there?" This question was objected to upon the ground that the member of the partnership, Fred Kirschner, with whom Mr. Grubb had the transaction, was dead, that the surviving member had no personal knowledge of the transaction at all, and that the defendant cannot now be heard to say that the words were not on the note at the time he signed it. This objection was sustained. The statute under which the objections were made is as follows:

"§ 5991. No person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the action, as a party thereto or otherwise; but such interest may be shown to affect his credibility: Provided, however, That in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, or as the guardian or conservator of the estate of any insane person, or of any minor under the age of fourteen years, then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him

by any such deceased or insane person, or by any such minor under the age of fourteen years: Provided further, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and who have no other or further interest in the action."

There can be no doubt that, if this note had been indorsed to an individual, and that individual had transferred the note to the plaintiff, in the event of the death of the individual, the defendant could not be heard to testify in his own behalf as to any transaction had by him with, or any statement made to him by, such deceased person. It is admitted by the defendant that he indorsed the note. The act of indorsement was as much a transaction with the deceased person as the signing of a note could be. It certainly could not be held that, where the maker of a note is sued, and the executor or administrator of the payee sues as deriving right by or through a deceased person where the signature is confessed, the maker can be heard to testify after the death of the payee that the note had been altered or changed after execution and delivery, without his consent. The presumption is that all transactions are honest, and that when a paper writing is executed it remains the same. The burden is upon one alleging the contrary to prove it. If a person may be heard to say that a note signed and delivered to another since deceased has been changed or altered, he may also be heard to testify to a transaction had by him solely with the deceased person, who, if alive, would be the only person who could contradict such testimony. The object of the statute clearly was that, where one of the parties to a transaction or contract is dead, the mouth of the other is closed concerning that transaction. If the defendant may be heard to say that the words "Demand and notice waived" were not on the note when he indorsed it, he

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may be heard to say that the note itself has been changed, or that it is not the note he intended to indorse, or he may be heard to contradict or vary the note in any other particular. If the words of waiver were not upon the note when the note was indorsed and delivered, but were subsequently placed there without the consent of the defendant, then the act of placing the words over the signature of the defendant was not a transaction by the defendant with the deceased person. But when it is admitted that there was a transaction, then a party in interest or to the record—the other being dead—cannot be heard to detail what that transaction was, or to say that there was no transaction. In other words, when defendant admits that there was a transaction, he cannot be heard to say that there was no transaction for the purpose of showing what the real transaction was. If the fact is that the note or indorsement has been materially changed since he signed and delivered it, that fact must be proved by some other evidence than evidence by the mouth of the defendant as to the condition of the note at the time it was indorsed. By this statute parties are placed upon a footing of absolute equality. One may testify when the other may. But when one of the parties to the contract or transaction is dead, then the other cannot be heard to speak as to what was said or done at the time of the transaction. Hardship may result in particular cases, but generally justice will more fully prevail by reason of the rule. The rule is stated in 2 Cyc., p. 250, as follows:

“Under statutory inhibitions against parties to suits testifying as to personal transactions with decedents in their lifetime, on the issue as to an alteration it is not competent for a party to testify as to the condition of an instrument at the time of its execution, when the other party is dead; but, on the other hand, questions which do not call for answers as to personal transactions with deceased during his life are competent.”

In *Boughton v. Bogardus*, 35 Hun, 198, it was held that the plaintiff could not be heard to testify that a receipt given by her to a deceased person had been changed by writing certain words over the signature of the witness. In *Re Brown's Estate*, 92 Iowa, 379 (60 N. W. 659), where the plaintiff was suing an estate, it was held that the plaintiff was not competent to testify whether or not the words upon the face of the check were upon it when delivered, because the evidence called for a personal transaction with the deceased person. To the same effect are the following cases: *Harris v. Bank of Jacksonville*, 22 Fla. 501 (1 South. 140, 1 Am. St. Rep. 201); *Benton County Sav. Bank v. Strand*, 106 Iowa, 606 (76 N. W. 1001); *Wilcox v. Corwin*, 117 N. Y. 500 (23 N. E. 165); *Kroh v. Heins*, 48 Neb. 691 (67 N. W. 771); *Jewell v. Walker*, 109 Ga. 241 (34 S. E. 337); *Foster v. Collner*, 107 Pa. St. 305.

In *Kline v. Stein*, 30 Wash. 189 (70 Pac. 235), where the suit was against third persons, this court held that, where the plaintiff claimed title to lands purchased from a deceased person, he could not be heard to state what was the transaction with the deceased person; and in *Re Alfstad's Estate*, 27 Wash. 175 (67 Pac. 593), that a surviving partner could not be heard to testify as to the alleged partnership agreement between herself and her deceased brother. In *Spencer v. Terrel*, 17 Wash. 514 (50 Pac. 468), it was held that, when a deed of property had been made to the wife during her lifetime, the husband, after her death, could not be heard to say that the deed to her was in fact in trust for him; and in *Whitney v. Priest*, 26 Wash. 48 (66 Pac. 108), that the wife of the plaintiff could not be heard to testify to the terms of an oral agreement made between her husband and a deceased person in her presence, because she was a party in

interest. It follows from these authorities that, if suit had been brought on this note by Hemrich & Co. against the indorser, and the indorser were dead, neither of the partners could have testified to the transaction of indorsement. If, as above stated, the object of the statute was to put the parties to the transaction upon a footing of equality, then it follows that, if suit had been brought by Grubb against Hemrich & Co. to cancel the note, and all the partners were dead, Grubb could not be heard to testify to any conversation or transaction with one of the deceased partners. When the note was indorsed and delivered by the defendant to Mr. Kirschner that act was certainly a transaction between Mr. Kirschner and the defendant.

It remains for us to consider the effect of the death of one of the partners upon the right of the defendant to testify to a transaction wholly with the deceased partner. We have seen above that under the statute, if A. were to execute and deliver a note to B., and B., after maturity of the note, were to indorse it to C., and C., after the death of B., were to bring suit on the note against A., A. could not be heard to testify concerning the transaction with B., because C. derives his right through B., a deceased person. If B. had a partner at the time he received the note and the note was in fact the property of the copartnership, it seems in reason that B.'s partner should be in no worse position, merely because he was a partner, than B.'s indorsee. B. holds a different position with reference to the partnership from a mere agent of the partnership. It is no doubt true that each partner in the firm has a right to bind the firm in the transaction of business within the scope of the copartnership, and that a transaction with one of the members of the firm is a transaction with the firm. But when any member of the

partnership dies the partnership is thereby dissolved, and under the statute of this state (Bal. Code, § 6188) the administrator of the individual estate of such partner must inventory the partnership assets, which are thereafter treated as the assets of a deceased person. Such an effect does not follow when a mere agent dies. It is not necessary in this case to, and we do not now, decide what the result would be in case of a similar transaction with the deceased agent of a partnership. What is said above is to show that there is a clear distinction between the death of a partner in a copartnership and the death of a mere agent for the copartnership; and, even if the rule prevails under the statute that declarations to or by, or transactions with, a deceased agent may be shown, it does not necessarily follow that the rule applies to declarations and transactions with or by a deceased partner. The rule is stated in 29 Am. & Eng. Enc. Law, p. 712, as follows:

“In an action by or against a surviving partner, the opposing party is not, as a rule, competent to testify to transactions or conversations with the deceased partner. But it has been held that the opposing party may testify where the surviving partner was present and was cognizant of the whole transaction, and where the transaction or conversation proposed to be proved was had with the surviving partner, though before the death of his copartner.”

The following cases are in point, and sustain the above rule under statutes similar to our own: *Harris v. Bank*, *supra*; *Gage v. Phillips*, 21 Nev. 150 (26 Pac. 60, 37 Am. St. Rep. 494); *Green v. Edick*, 56 N. Y. 613; *Clift v. Moses*, 112 N. Y. 426 (20 N. E. 392); *Edwards v. Parker*, 88 Ala. 356 (6 South. 684); *Alexander's Exrs. v. Alford*, 89 Ky. 105 (20 S. W. 164); *Standbridge v.*

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Catanach, 83 Pa. St. 368; *Hanna v. Wray*, 77 Pa. St. 27; *Stuart v. Altman*, 8 Tex. Civ. App. 657 (28 S. W. 461).

Many of the states, like Michigan, Ohio, Kansas, and others, have statutes expressly providing that a party in interest cannot testify where the transaction was with the deceased partner. Our statute in express terms does not so provide, but its terms are broad enough, and were intended, to include such persons. There are some authorities which hold the opposite rule, notably *Hess v. Lowrey*, 122 Ind. 225 (23 N. E. 156, 7 L. R. A. 90, 17 Am. St. Rep. 355); *Clapp v. Hull*, 18 R. I. 652 (29 Atl. 687); *Combs v. Black*, 62 Miss. 831.

We think the rule quoted above is in accord with the spirit of our statute, and amply supported by reason.

It was, therefore, not error to sustain the objection to the evidence offered on the ground named, and the judgment is affirmed.

DUNBAR and ANDERS, JJ., concur.

[No. 4184. Decided February 11, 1903.]

JOSEPH PAYETTE, *Respondent*, v. J. W. FERRIER, *as Administrator, Appellant*.

APPEAL — FINDINGS OF FACT — EXCEPTIONS.

Exceptions to findings of fact are unnecessary, where judgment is given on the pleadings, and that is the only error assigned.

JUDGMENT ON PLEADINGS — DENIAL OF IMMATERIAL ISSUES.

In an action for the rescission of a conveyance, because the obligation to support the grantor during his life had been ended by the death of the grantees, judgment for the grantor on the pleadings was warranted, where the answer admitted the consideration for the deed and the death of the grantees and its only denials were addressed to the immaterial allegations of the com-

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plaint that the sum of one dollar specified in the deed had not been paid and that the grantees had not supported the grantor for certain years.

JUDGMENTS — RES JUDICATA.

A judgment giving a right of lien for support against lands conveyed by plaintiff in consideration thereof, but denying rescission based on the failure of defendants to support plaintiff, is not *res judicata* as to a subsequent action which seeks rescission on the ground of the cessation of the obligation to support by reason of the death of the grantees.

SAME — LAW OF THE CASE.

Where a plea of *res judicata* was determined on a prior appeal of the same cause adversely to appellant, it became the law of the case on a retrial thereof.

Appeal from Superior Court, Lewis County.—Hon. WILLIAM O. CHAPMAN, Judge. Affirmed.

Reynolds & Stewart, for appellant.

J. E. Willis and Joseph Payette, for respondent.

The opinion of the court was delivered by

ANDERS, J.—This is the second appeal in this cause. The opinion of this court on the former appeal is reported in 20 Wash. 479 (55 Pac. 629), and, as therein stated, two causes of action are attempted to be set up in the complaint: The first, to subject the premises in question to a lien for plaintiff's support; and the second, to cancel and set aside a conveyance of the premises made to Jacob Patton and Ida Payette Patton, and also to cancel and set aside a mortgage upon the premises given by Jacob and Ida Patton to the defendant Jacobus. For a second cause of action the complaint alleges, in substance, among other things, that on the 9th day of March, 1882, the plaintiff, in order to secure for himself for the remainder of his life protection and support at the hands of his daughter, Ida Payette Patton, and her husband, Jacob Patton, both of

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whom died in Lewis county, Washington, before March, 1892, conveyed to said Jacob Patton and wife the lands described in the deed attached to and made a part of the complaint, and in which deed the said grantees covenanted and agreed to clothe, board, and maintain the said grantor during his lifetime, or, at the option of either party, to furnish him each year certain specified kinds and quantities of provisions, clothing, and medicine, if needed, and fire wood in case he should be unable to get it himself, and one cow, if needed, and, if in need of a cooking stove, to pay one-half of the cost thereof; that J. W. Ferrier was appointed administrator of the estates of Ida Payette Patton and Jacob Patton by the superior court of Lewis county on February 25, 1893, and is now the legally qualified and acting administrator; that May Saunders was appointed guardian of the minor children (mentioning them) of Jacob Patton and wife, now deceased, and still is such guardian; that the defendants have not boarded, clothed, maintained, or cared for this plaintiff, neither have they paid the yearly rent of articles mentioned and reserved in said deed by this plaintiff for the years 1893, 1894, 1895, and 1896, and the same is now due and payable; that, although one dollar is mentioned in said deed as a part of the consideration for the same, as a matter of fact it was not intended as any part of such consideration, was never paid, and was inadequate and insufficient as a consideration, as compared with the value of said premises; that said instrument was executed and delivered in consideration of the agreement of Jacob Patton and Ida Payette Patton, therein set forth, to maintain, care for, and support this plaintiff, or to pay a yearly rental of necessities and supplies therein reserved, for and during the natural life of the plaintiff, on the first day of December of each and every year during plaintiff's

lifetime, and that said deed was accepted by said grantees with all the reservations and conditions therein contained; that the consideration for said deed of conveyance, as reserved therein, has utterly failed, and has not been paid to this plaintiff, which consideration was well known to all of the above named defendants; that on July 14, 1894, the said J. W. Ferrier, as administrator of said estate, in pursuance of an order made by the judge of the superior court, sitting in probate, sold the remainder of the real estate described in this complaint, after setting apart a homestead to said minor children of the deceased as directed by said court, to one Cora Blake, which premises so sold are particularly described in the complaint; that said Cora Blake at the time had notice of the state of the title to said premises; that the court at the time of signing the said order of sale was not aware of the fact that this plaintiff had or claimed an interest in said lands and premises, but said defendants J. W. Ferrier and J. R. Jacobus each knew, when said sale was pretended to be made, that this plaintiff did have an interest in said premises, and that said pretended sale was a fraud upon his rights, and, as to him, was null and void; that the defendants Lena Patton, Annie Patton, Charles Patton, and Willie Patton are in the actual occupancy and possession of said premises, and that the defendants and each of them claim to have some lien or claim against said premises, the precise nature of which is to this plaintiff unknown, but whatever lien or claim said defendants have, if any, is junior and subject to the plaintiff's right to said premises. The prayer of the complaint is for judgment for \$900, the reasonable value of the supplies which should have been furnished plaintiff for the year 1893 and up to and including the year 1896, less the sum of \$80.70, the costs adjudged against the plaintiff in an ac-

tion commenced by him in the superior court of Lewis county in the year 1895 against all the defendants herein, except J. R. Jacobus. (This portion of the prayer refers especially to matters set forth in the first cause of action.) The plaintiff further prays in his complaint that his lien or claim for supplies due be foreclosed and the premises sold in satisfaction thereof, or that the deed given by the plaintiff to Ida Payette Patton and Jacob Patton be rescinded and canceled, that the plaintiff may have the possession of the premises, and for such other and further relief as to the court may seem equitable. We have thus briefly set forth the facts constituting plaintiff's second cause of action in order that the decision of this court on the first appeal may be readily understood. This action was commenced in March, 1897. A demurrer was interposed to the complaint by the defendant Ferrier, as administrator, and by the defendant Jacobus. The demurrers were sustained and the action dismissed, whereupon the plaintiff appealed. In the course of the opinion on that appeal this court said:

"Plaintiff bases his right to a lien upon the land for support and maintenance upon a decree of the superior court of Lewis county entered in March, 1896, in a suit then pending between the present parties, with the exception of the respondent Jacobus, who was not joined in that action. That action was based upon an alleged failure to furnish support prior to the year 1895. The court denied a rescission, but entered a decree which recited that plaintiff was given a right to a lien upon the premises for the support to which he was entitled for the year 1893 and subsequent years. Appellant insists that this decree established his right to a lien, and that the question is *res adjudicata* as to respondent Jacobus, although he was not a party to that suit, and bound him, as the privy of the grantees Patton and wife. The conclusion we have reached regarding the other cause of action set up in the

complaint makes it unnecessary to determine the effect of the former decree as regards the question of plaintiff's right to a lien."

It will thus be seen that the only question which was presented for consideration and not determined on the former appeal was simply the *effect* of a decree of the superior court granting the plaintiff a *right* to a lien. And we think the court was fully justified in assuming that, if the complaint stated facts sufficient to entitle the plaintiff to a cancellation of his deed, it was a matter of little or no consequence whether or not he was also entitled to a lien. Upon the question whether the averments of the complaint entitled the plaintiff to a rescission, we there said:

"We think the demurrer was improperly sustained as to the second cause of action. The jurisdiction of a court of equity to cancel a conveyance made by a parent to a child, when the child fails to furnish the support provided by the agreement constituting the consideration for the conveyance, is well established. . . . It appears from the complaint in the present case that the sole consideration for the conveyance from the plaintiff to his daughter and her husband was their agreement to support and maintain him. The duty to do so was and became a personal and continuing one. The obligation was not assignable, but to be performed by them only. The mortgage executed by the grantees to the respondent Jacobus must be given the same effect as a deed, and it is well settled that, where a child attempts to transfer and assign this personal obligation for maintenance which he owes to his parent, the parent has a right to a rescission and cancellation of the conveyance."

For the foregoing reasons, and the further reason that the covenants of the grantees to support and maintain the plaintiff were personal and died with them, and that the happening of that event put an end to the obligation, this court concluded that, upon the allegations of the com-

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plaint, the plaintiff was entitled to a cancellation of the instrument therein referred to.

It was there claimed by the defendant Ferrier (appellant here), on the first appeal, that the decree in the former case constituted a bar to plaintiff's recovery in this action, but the court held that this action was not barred thereby for the reason that the rescission was claimed in the other action solely upon the ground of failure to support, and that the effect of the conveyance to respondent Jacobus, or of the death of the grantees, appeared not to have been considered or determined by the court in that action. The cause was accordingly remanded to the superior court, with directions to overrule the demurrers to the second cause of action. Upon receiving the remittitur from this court, the court below set aside the order of dismissal and entered an order in accordance therewith. The defendant Ferrier then filed his answer denying that the defendants had not boarded the plaintiff, or furnished the supplies mentioned in the deed for the years 1893, 1894, 1895, and 1896, and that a consideration of one dollar was not paid for the deed, and setting up the proceedings in the action brought by plaintiff in 1895 against all the defendants herein, except Jacobus, including the judgment therein denying a rescission and cancellation of the plaintiff's deed and awarding costs to the defendant Ferrier, and alleging that from the date of the execution of the deed, in 1882, Jacob Patton and Ida Payette Patton, their minor children, and the defendant Ferrier, as administrator, had been in possession of the premises in controversy, claiming the same adversely to the plaintiff. It was also alleged in the defendant's answer that Ida Payette Patton died in August, 1891, and Jacob Patton died in March, 1892, and that the defendant has been administrator of their estates since April, 1892;

that more than two years after the death of Jacob Patton and wife, and the appointment of the defendant as such administrator, the plaintiff commenced an action in the court aforesaid for the rescission and concellation of his deed, for the possession of the premises, and for damages and costs; that judgment was rendered in said action against the plaintiff (as above stated) on April 27, 1896, and that no appeal was ever taken from that judgment, and the same is in full force and effect; that when plaintiff's deed was executed the lands therein described were wild and unimproved, and that Patton and wife, with the knowledge of plaintiff, had cleared the land and made improvements thereon of the value of more than \$3,200, and paid taxes thereon to the amount of \$250; that plaintiff had never paid or offered to pay for said improvements, or to refund the taxes paid by Patton and wife and the defendant on said premises. It will be observed that the execution of the deed from respondent Payette to Patton and wife, as alleged in the complaint, as well as the appointment of defendant as administrator of their estates, is admitted in the answer of the defendant. And it appears from the recital of the findings of the superior court set forth in the defendant's answer, as well as from the complaint, that Patton and wife mortgaged the premises in controversy to the defendant Jacobus.

A demurrer was filed by the plaintiff to the answer of the defendant Ferrier, and also a motion for judgment on the pleadings, and at the hearing, the demurrer having been withdrawn, the court granted the plaintiff's said motion, and the answering defendant excepted. After announcing his decision, the judge made and filed his findings of fact and conclusions of law, and a decree was thereupon entered, rescinding and cancelling the deed

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from the respondents Patton and wife, and revesting the entire estate in the respondent.

The appellant Ferrier did not except to the findings of fact made by the superior court, or print the same in his brief, and for that reason the respondent moves to dismiss the appeal. But, inasmuch as no evidence whatever was taken or offered in the case, and the findings of fact were in effect but a repetition of the allegations of the complaint, and no claim of error is based thereon, we think that the learned counsel for appellant properly regarded such findings as immaterial and exceptions thereto unnecessary. The motion to dismiss is denied.

The learned trial judge found in the present case, as conclusions of law: (1) That the defendant Ferrier has denied none of the material allegations of the second cause of action; (2) that the second further and separate answer to said second cause of action contains nothing now material as a defense, and nothing that the court can legally consider in the determination of this cause; (3) that the covenants of the grantees, Ida Payette Patton and Jacob Patton, to support and maintain the plaintiff, were personal and died with them, and their death put an end to the obligation; (4) that the admission of the death of Ida Payette Patton and Jacob Patton eliminated the defense set up by the defendant J. W. Ferrier; and (5) that the plaintiff is now entitled to be revested with the title to the premises involved herein (describing them), and entitled to judgment accordingly, and to his costs and disbursements herein legally expended. Exceptions were properly saved to these conclusions. It will be observed that the foregoing conclusions of law are largely based upon the opinion of the court in this cause on the other appeal. It is insisted by his counsel that the answer of the appellant denied material allegations of the plain-

tiff's complaint which it was necessary for him to prove in order to maintain his action, and that the court therefore erred in rendering judgment on the pleadings. These denials, as we have seen, simply controverted the allegations of the complaint that the sum of one dollar specified in the deed as part of the consideration therefor was not, in fact, paid or intended to be paid, and that the defendants had not boarded the plaintiff or furnished the articles mentioned in the deed for the year 1893 and certain subsequent years. And in view of the former ruling of this court that the covenants of the grantees to support and maintain the respondent were personal and died with them, and that the death of the grantees put an end to the obligation, it would seem that the issues raised by these denials could not affect the right of the respondent to a rescission and cancellation of his deed which resulted in consequence of the death of his grantees. Under the circumstances, therefore, we think the court did not err in declaring the issues thus formed to be immaterial.

The main contention, however, of the appellant is that the judgment in the other action constitutes a complete bar to the respondent's recovery in this suit, and several decisions of this court and others are cited in support of the proposition that the plea of *res judicata* applies as a general rule not only to questions upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time. We do not dispute the general doctrine contended for by appellant, but it must be borne in mind that this same point was made in the brief of appellant on the former hearing, and was then decided adversely to the contention of appellant upon the grounds that, as

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a matter of fact, the effect of the conveyance to Jacobus, or of the death of the grantees, was not considered or determined by the court, and that the obligation to support was a continuing one. That decision became and is the law of this case, and the court below committed no error in so considering it. Some other points are made in the brief of the learned counsel for appellant, but, as they seem to us to be without substantial merit, a discussion of them is deemed unnecessary.

Under the admissions of the answer, we feel satisfied that the respondent was entitled to a cancellation of his deed, and the judgment is therefore affirmed.

FULLERTON, C. J., and MOUNT, DUNBAR and HADLEY, JJ., concur.

[No. 4578. Decided February 14, 1903.]

THE STATE OF WASHINGTON *on the Relation of Hiram L. Post, v. SUPERIOR COURT OF SPOKANE COUNTY, Henry L. Kennan, Judge.*

PROHIBITION, WRIT OF — TO SUPERIOR COURT — VACATION OF JUDGMENT AFFIRMED ON APPEAL — HEARING IN LOWER COURT.

The writ of prohibition will not issue to restrain a judge of the superior court from trying a petition for the vacation of a judgment which had been affirmed on appeal, but which the supreme court, upon showing made, had permitted to be attacked in the lower court, when the judge of such court makes a showing that he will try such petition according to the law and the evidence, unbound and unrestricted by the action of the supreme court in passing upon the sufficiency of the showing made.

SAME — REMEDY BY APPEAL.

The fact that a petition for the vacation of a judgment was docketed by the clerk as a separate proceeding, and that there

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is no appeal from an order vacating a judgment, would not afford grounds for the issuance of a writ of prohibition to restrain the superior court from hearing same, since the proceeding must in effect be regarded as within the action in which the judgment sought to be attacked was rendered, and an appeal from such judgment would bring up for review the orders of the court in regard to its vacation.

Original Application for Prohibition.

Norman Buck, A. M. Craven, Sullivan, Nuzum & Nuzum and Barnes & Latimer, for relator.

John P. Judson, for respondent.

The opinion of the court was delivered by

HADLEY, J.—This is an original application in this court for a writ of prohibition, directed to the superior court of Spokane county and to the Hon. Henry L. Kennan, one of the judges thereof. The relator obtained a judgment against the city of Spokane, from which judgment the city appealed to this court. Pending the appeal here, the city, as appellant, moved to dismiss the appeal. The written motion to dismiss the appeal also contained the statement that the motion was made to enable the appellant to present a petition to the superior court to set aside and vacate the judgment appealed from, based upon the discovery of documentary evidence after the appeal was taken, which it was alleged establishes the fact that the respondent in that action, the relator here, was many years ago paid by the said appellant for the same service for which the judgment was rendered. The motion to dismiss the appeal was granted. Thereafter the relator here, as respondent in that action, moved for an affirmance of the judgment as his right, following the dismissal of the appeal. The latter motion was also granted, the reasons therefor being stated in the opinion in *Post v. Spokane*, 28 Wash. 701 (69 Pac. 371). In that opinion

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we stated that, notwithstanding the affirmance of the judgment, we did not then hold that the appellant city would have no remedy based upon the alleged facts stated in its motion to dismiss the appeal; and further stated that upon satisfactory showing having been made in this court, leave had theretofore been granted in some instances to attack judgments which had been affirmed here. Some time thereafter the said appellant city filed in this court its petition asking leave to attack said judgment in the superior court of Spokane county, where it was rendered. That petition was accompanied with what purported to be certain record and documentary evidence, together with certain affidavits, all of which tended to support the allegations of the petition. Upon that petition this court entered a formal order granting leave to file a petition in the court below. See *Post v. Spokane*, 28 Wash. 704 (69 Pac. 1104). In pursuance of the permission thereby granted, the record in this case shows that said petitioner thereafter filed its petition in the superior court of Spokane county. The petition there filed appears to be in all respects the same as the one filed here, including the attached affidavits and documentary matter. It was also docketed by the clerk as a separate and independent action. The relator then moved to strike portions of the petition, including the attached affidavits and documentary matter. The motion was denied, and the order denying the motion recites that the motion was in all particulars denied, for the reason that this court had already passed upon the sufficiency of the petition and had ordered that court to hear the same. The relator then demurred to the petition, and the demurrer was overruled. Thereupon the relator applied to this court for a writ of prohibition, and, among other things, he alleges that the superior court has determined that this court has already passed upon

the sufficiency of the petition, and that the superior court has no jurisdiction to determine the sufficiency of the contents thereof. It is further alleged that upon the demurrer to the petition it was urged that the court had no jurisdiction under the general law of the state, and no authority under the order of this court hereinbefore mentioned, to entertain an entirely new and independent action to vacate said judgment. It is also alleged that, unless the court is prohibited, the said Hon. Henry L. Kennan, the judge before whom said cause will be tried, will try the same under a misconception of the meaning of the order of this court, and will determine the facts to a great extent from the affidavits attached to the petition, and which he refused to strike therefrom, under the theory that he is obliged to consider said matter in whole or in part upon the said affidavits. It is alleged that the relator has no appeal from any order that may be made by said judge in the premises. The respondent in his answer denies that he will proceed to try said cause under a wrong conception of the order of this court, and alleges that it is not true that the said superior court will try said cause upon the theory that the court will be precluded by any order made by this court from entertaining objections to the sufficiency of the petition filed by the city of Spokane; that it is not true that he believes that he is in any way restricted from passing upon the sufficiency of the petition or any pleading in the cause by reason of any order of this court; that he does not believe that he is bound to decide said cause upon the said affidavits attached to the petition; and that he believes said affidavits would be incompetent to establish any fact therein set forth upon the final hearing; and that he feels free to try said cause according to the law of this state

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as he understands it, as if this court had made no order in the premises.

It is urged by the relator that the recitals of the order denying the motion to strike from the petition heretofore referred to show that the respondent entertained a different view at the time of entering said order from that now expressed in his answer. Be that as it may, his answer discloses that it is not now his intention to proceed upon the theory that he is restricted by any order of this court, but that he expects now to proceed upon the theory that he has as full general powers to determine both the sufficiency of the pleadings and the facts as he would have in any other cause. If any errors have already been committed in the settlement of the pleadings based upon a wrong theory of the powers of the court in the premises, those may be corrected upon appeal if they shall not hereafter be corrected by the trial court itself.

If any doubt has existed in the mind of the respondent and of the parties as to the scope and force of the order of this court heretofore mentioned, we deem it proper now to say that this court intended only to grant leave to file a petition in the lower court to vacate a judgment which had been affirmed here. A certain petition was before us, and attached to it were certain affidavits and documentary matter. We treated the affidavits merely as an evidence of good faith on the part of the petitioner, since they *prima facie* tended to support the allegations of the petition, and showed such a state of facts as we believed should be investigated in a proper manner under competent testimony, subject to all the usual rules which test the sufficiency of evidence. It was our understanding that the petitioner then before us desired to file a petition below containing substantially the same allegations as the one before us. But we did not expect that what was sub-

mitted to us in the nature of evidentiary matter would necessarily be treated as a part of that petition. When we said, "The prayer of the petition is therefore granted, and leave is hereby given appellant to file its said petition in the superior court, and for that court to proceed and hear the same," we did not mean that all the matter then before us was necessarily to be filed in the superior court as a petition. The order recites that " . . . the appellant, by petition now filed here, asks leave to file its petition in the superior court to vacate the judgment," When we granted said appellant leave to file "its said petition," we, of course, simply referred to such a one as it had asked leave to file, viz., "to vacate the judgment." It must be understood that such petitions shall be constructed according to the rules pertaining to such pleadings, and can only be supported by competent proof, the sufficiency of both the pleadings and the proof to be determined by the trial court, subject, of course, to correction of errors on appeal.

The relator urges that the respondent is about to hear this matter as a separate and independent action, and that if it shall be adjudged that the judgment in the former action shall be vacated, relator will be without remedy by appeal, since this court has held that an appeal does not lie from an order vacating a judgment. In other words, it is relator's theory that the proceedings for the vacation of the judgment cannot be reviewed on appeal from the final judgment in the former action, since they are not had within that action. Under no rule can relator be deprived of his right to a review of the proceedings for the vacation of the judgment. The reason for the holding of this court that an appeal does not lie from an order vacating a judgment is that such order may be reviewed on appeal from the final judgment, and thus avoid the

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Opinion of the Court.—HADLEY, J.

probable necessity of more than one appeal in the same action. The rule is based upon the theory that all the proceedings are in the same action. It appears that the clerk has separately docketed the petition as though it were a complaint in an independent action, but it is filed in the same court where the judgment was rendered, and the court understands that it assails one of its judgments in a certain action. If a formal consolidation of the later proceedings with the former cause and a transfer of the files from the one to the other are not actually ordered by the court, the proceeding must nevertheless be in effect regarded as being within the former action. The procedure by petition is authorized by §§ 5153 and 5156, Bal. Code. The petition was filed within one year from the date of entry of the judgment, and this court has held that procedure by the statutory method is exclusive when the facts upon which it is based are discovered in time to take advantage of the statutory remedy. Otherwise resort may be had to a suit in equity. *Chezum v. Claypool*, 22 Wash. 498 (61 Pac. 157, 79 Am. St. Rep. 955); *Peyton v. Peyton*, 28 Wash. 278 (68 Pac. 757).

The fact that § 5157, Bal. Code, requires notice for the same time as required in original actions, does not establish the proceeding as an original cause, but merely directs how notice shall be given and otherwise indicates how it shall be tried. Thus, this petition must be treated as within the original cause, and no right of appeal on the part of the relator is abridged or denied.

Respondent's answer shows clearly that he intends to proceed regularly with the hearing of the matter, and there does not appear to be any cause for interference by this court at this time.

The writ is denied.

FULLERTON, C. J., and DUNBAR, MOUNT and ANDERS, JJ., concur.

[No. 4284. Decided February 16, 1903.]

W. L. ROBINSON *et al.*, Appellants, v. STERLING BROOKS,
Respondent.

LIENS — ENFORCEMENT — BAD FAITH.

Where non-lienable items are wilfully and intentionally inserted in a claim of lien along with lienable items, a court of equity will refuse to enforce the lien for any portion of the claim.

SAME — DISMISSAL OF ACTION.

Where the equitable jurisdiction of the court had failed by reason of the bad faith of plaintiffs in attempting to enforce a lien for more than they were entitled to, it was not error for the court to dismiss the action and compel plaintiffs to pursue their remedy at law.

Appeal from Superior Court, Lincoln County. Hon.
CHARLES H. NEAL, Judge. Affirmed.

Martin & Grant, for appellants.

Myers & Warren, for respondent.

The opinion of the court was delivered by

MOUNT, J.—This is an action in equity to foreclose a lien upon certain wheat belonging to respondent. The complaint is in the usual form of foreclosure. The notice of lien sought to be foreclosed recites, in substance, that appellants claim a lien for \$110 for cutting 110 acres of wheat at the agreed price of \$1 per acre. It also recites a breach of contract by respondent, on account of which breach appellants sustained damages in the sum of \$60, profits which appellants would have made had the contract been completed as agreed, and further damages in the sum of \$60 by reason of appellants remaining idle for four days on account of said breach of contract, and a claim of lien for the sum of \$230, less \$24.50 paid

Feb. 1903.] Opinion of the Court.—MOUNT, J.

thereon. The complaint prayed for the sum of \$205.50, for foreclosure of the lien to satisfy the same, and for the further sum of \$100 attorney's fees, and \$10 cost of preparing and filing the lien. When the cause came on for trial, respondent objected to the lien notice offered in evidence by appellants upon the ground that the lien notice was void because lienable and nonlienable items were united therein. The court sustained this objection. Thereupon appellants requested the court to proceed irrespective of the lien, and to permit appellants to establish their claim against the respondent for a money judgment. Respondent objected, this objection was sustained, and the cause dismissed. From this judgment of dismissal the plaintiffs below prosecute this appeal.

We think the lower court was clearly right in rejecting the lien notice. If the appellants had a right to a lien on the grain in question, the amount of the lien was for \$110, less the payment of \$24.50, or \$85.50. Instead of filing a lien for that amount, they filed a lien for \$205.50. \$120 of which was for items clearly not lienable under the statute. Appellants never supposed, and do not now claim, that these items were lienable or inserted by mistake or inadvertence. They were wilfully inserted in the notice of lien, and a claim made therefor. It is manifest from the record that the lien claimants inflated their real claim for \$85.50 to \$205.50, and sought to foreclose the same for the full amount, besides \$100 attorney's fees. The evidences of bad faith are so clear that the whole claim should fail. *Powell v. Nolan*, 27 Wash. 338 (67 Pac. 712).

We do not think the court erred in dismissing the action. The cause was tried on the equity side of the court, and was triable without a jury. No jury had been impaneled. If the action had been brought under the contract alleged,

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or for damages for the breach thereof, the defendant would have been entitled to a jury trial. The equitable jurisdiction having wholly failed, because there was no valid lien, the right to proceed in equity should also cease. The court, in its discretion, might properly have called a jury and tried the cause as a law case; but it was not error, under the circumstances, to dismiss the action, and leave the plaintiffs to pursue their remedy at law to obtain a money judgment against the defendant.

The judgment is affirmed.

FULLERTON, C. J., and DUNBAR and ANDERS, JJ.,
concur.

[No. 4265. Decided February 18, 1903.]

81	62
732	314

IDA J. BURGERT, *Appellant*, v. PAT CAROLINE *et al.*,
Respondents.

TAXES — PAYMENT BY GUARDIAN — RIGHT TO LIEN.

Where a guardian, in order to protect lands belonging to her wards, and owned by them as tenants in common with adult persons, pays delinquent taxes thereon from her own funds, such guardian is entitled to a lien against the lands for the amount so paid, even as against the adult owners, since she does not occupy the position of a mere volunteer, but is chargeable with the duty of protecting the interests of her wards.

Appeal from Superior Court, King County.—Hon.
BOYD J. TALLMAN, Judge. Reversed.

James Hamilton Lewis and *Thomas B. Hardin* (*Leroy V. Newcomb*, of counsel), for appellant.

James McNeny, for respondent.

Feb. 1903.] Opinion of the Court.—FULLETON, C. J.

The opinion of the court was delivered by

FULLETON, C. J.—The appellant seeks by this action to be reimbursed for taxes paid by her on certain lands belonging to the respondents. Demurrers were interposed and sustained to her complaint, after which she elected to stand thereon, whereupon judgment of dismissal and for costs was entered against her. This appeal is from that judgment.

The pertinent facts upon which the appellant bases her claims are these: In 1892 her children, eight in number, became the owners as tenants-in-common, of certain land situate in the city of Seattle, in this state. Of these children, one had then reached the age of majority, and another reached that age in the following year. The others were and still are minors, and appellant between the month of February, 1892, and the month of April, 1900, was their duly appointed, qualified, and acting guardian. State, county, and city taxes were annually levied and assessed against the property during the time the appellant was acting as such guardian, and on November 1, 1899, amounted, in principal, interest, penalties, and costs, to the sum of \$1,360.99. All of these taxes were then delinquent, and for a part thereof—those for the year 1895 and preceding years—a judgment of forfeiture had been entered, and a delinquency certificate issued therefor, pursuant to law, to the county of King. The land was nonproductive, and the appellant did not have, as guardian, any funds or means whereby she could pay these taxes. This being the condition on November 1, 1899, the appellant requested the adult tenants-in-common to pay their portion of the taxes then due, and, on their failure so to do, paid the entire tax out of her own funds, redeeming the land from the judgment of forfeiture, and causing to be canceled all of the taxes assessed against the land and

due at that date. Subsequent to this payment, one of the adult owners conveyed her interest in the land to one Huston, who in turn conveyed to the respondent, Pat Caroline, each of whom, it is alleged, purchased with knowledge of the circumstances and of the fact that the appellant claimed a lien on the land. Still later, the appellant resigned her trust as guardian, and was succeeded by the respondent, Bernard Pelly. The appellant sues the guardian by leave of court. She seeks to have the amount paid by her as taxes declared a lien upon the land against which it was assessed, and to have the lien foreclosed and the land sold to satisfy the same. The principal question suggested by the record, therefore, is, has the appellant a lien on the land for the taxes paid by her.

It is elementary, of course, that one person cannot ordinarily make himself the creditor of another by paying, without request or consent, the debt of that other; and, applying this principle, it is generally held that a stranger to the title to real property cannot make himself the creditor of the owner of the property by voluntarily paying the taxes assessed against it. Every taxpayer, it is said, has the right, as between himself and a third person, to pay his taxes in his own time and in his own way, and to the municipality to which it is due, and cannot be compelled to accept as a creditor a stranger who voluntarily makes such payments. But, notwithstanding the rule is thus clear when applied to payments of taxes made by a volunteer, it is equally clear that a person having a valid subsisting interest in real property, or a lien thereon, may pay the taxes assessed against the property whenever it becomes necessary to protect his interests or lien, and can enforce a lien on the land, for the amount paid, against the interests of any person who in justice ought to have paid the

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tax. In this state the rule is even broader than this. By statute it is declared that:

“When any tax on real estate is paid by or collected of any occupant or tenant, or any other person, which, by agreement or otherwise, ought to have been paid by the owner, lessor or other party in interest, such occupant, tenant or other person may recover by action the amount which such owner, lessor or party in interest ought to have paid, with interest thereon at the rate of ten per cent. per annum, or he may retain the same from any rent due or accruing from him to such owner or lessor for real estate on which such tax is so paid; and the same shall, until paid, constitute a lien upon such real estate.” Bal. Code, § 1738.

In *Farrell v. Gustin*, 18 Wash. 239 (51 Pac. 372), we held that taxes paid after the foreclosure of a junior mortgage, but prior to the expiration of the time for redemption, although not delinquent, might be recovered as a lien on the land against the rights of the redemptioner or a prior mortgagee. So in *Fischer v. Woodruff*, 25 Wash. 67 (64 Pac. 923, 87 Am. St. Rep. 742), we held that a junior mortgagee who had paid taxes on the mortgaged property for the purpose of protecting his mortgage lien, and without knowledge of the existence of a prior mortgage thereon, was entitled to have the sum paid declared a lien superior to the prior mortgagee. And in *Packwood v. Briggs*, 25 Wash. 530 (65 Pac. 846), we held that a judgment creditor who had paid the taxes on his debtor's lands, under the belief that his judgment was a lien thereon and that he was protecting his lien by so doing, was entitled to a lien for the sum so paid as against a mortgagee of the land. This statute and these cases but emphasize the fact that it is the policy of the law to encourage the payment of taxes. The government, in order to exist, must not only levy a tax at stated intervals

on all the property within its jurisdiction, but must insist that the tax levied be paid within a reasonable time. The law does not, therefore, inquire too nicely into the interests or motives of those who pay taxes lawfully assessed upon property. But it will, whenever the interests of justice require it, allow those who have an interest or a *bona fide* claim of interest in the property of another, and who have paid taxes thereon which rightfully should have been paid by that other, a lien against the land for the amount of the taxes paid.

But it is said that the appellant does not fall within the rule of one having an interest or a *bona fide* claim of interest; that she was at most only guardian of some one who had an interest and who might have paid the taxes, but had personally no such interest as would authorize her to pay them out of her own funds. It seems to us, however, that she had such an interest as would bring her within the provisions of the rule above cited. As guardian, it was her duty to protect the interests of her wards in every way in her power. While her duty did not go so far as to require her to pay from her own funds the taxes accumulated upon her wards' property, yet she had the right to do so, and to be reimbursed out of their property for the amount so paid. Had she purchased the property with her own funds at a tax sale, equity would not have permitted her to hold it against the claim of her wards. As she could not purchase the estate for her own interest, justice requires that she should not be held a volunteer when she purchases for her wards. But it is said further that, whatever view may be taken of her rights, when considered with reference to her wards, she was a volunteer so far as the adult owners were concerned. We do not think so. The property was assessed and the tax levied as a whole, and she, as the representative of one

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tenant-in-common, had the right as against the others to pay the whole tax, and can recoup, under the statute, a just proportion of the amount paid from each of the several owners.

Concluding, therefore, that the complaint states a cause of action, the judgment is reversed, and the cause remanded with instructions to overrule the demurrers and require the defendants to answer to the merits.

MOUNT, DUNBAR and ANDERS, JJ., concur.

[No. 4366. Decided February 18, 1903.]

A. E. WILSON, *Respondent*, v. NORTHERN PACIFIC RAILWAY COMPANY *et al.*, *Appellants*.

MASTER AND SERVANT — NEGLIGENCE — FAILURE TO WARN OF HIDDEN DANGERS.

Injury to a section hand as the result of a heavy boulder being thrown down by another section hand getting out rock from a sandy bluff above for riprap work is chargeable to the negligence of a fellow servant instead of the master, where the section foreman had ordered rocks to be thrown down suitable for a certain class of riprap work, and an inspection of the side of the bluff had shown the rocks to be of apparently small size, and the boulder causing the damage, although unsuitable by reason of size and shape, had been dug up where it lay imbedded and half concealed in the sand and then thrown down without warning, the foreman having no other or better means of knowledge of the dangers of the work than the section hand himself.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Reversed.

Stephens & Bunn, for appellants.

A. H. Kenyon, for respondent.

31	67
37	506
31	67
39	636
31	67
40	286

The opinion of the court was delivered by

MOUNT, J.—Action for personal injuries. The plaintiff was employed as a section man by the Northern Pacific Railway Company. He was in charge of defendant Ostrand, who was foreman of the "section gang." It was the duty of the defendant Ostrand and the men under him to keep a section of the defendant's railway track in repair. On the 27th day of February, 1901, there was danger of water washing out a portion of the railway track at a point west of Spokane along a high sand hill. At this point the railway was graded along the side of the hill, the grade being about thirty feet wide. Above and below the grade the hill was quite steep, but was open and in plain view, and was composed principally of sand, with a few small rocks scattered over the surface. The defendant Ostrand, on the day above named, took the plaintiff and four other men to the point above described to keep the water from the track. Two of the men were put to work at a point east of the place of the accident hereinafter described, and the defendant Ostrand, with the plaintiff and two other men, proceeded to the point of the accident. When they arrived there plaintiff undertook to dig a ditch between the railway track and the hill above, so as to cause the water to flow parallel with the track. The sand was loose, and washed into the ditch as fast as plaintiff could shovel it out. He thereupon undertook to make an embankment next to the side of the track nearest the hill above, and placed flat stones against the sides of this embankment to keep the water from washing the sand away. Defendant Ostrand thereupon directed two of the men to go upon the side of the hill above the plaintiff and throw stones down to him for use in riprapping by plaintiff. These men thereupon went above the plaintiff, and began throwing stones down to him,

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gradually working their way up the hill as the near-by stones were all picked up. These stones, weighing from six to eight pounds, were thrown first on one side of plaintiff and then on the other. Neither plaintiff nor defendant apprehended any danger therefrom because the stones were small. No warning was given by the men when they were about to throw a stone down. Finally, one of the two men on the side of the hill dug out of the sand a large stone weighing from sixty to one hundred pounds, and started it down the hill. This stone struck plaintiff, and broke his left leg. This action was brought against the defendant railway company and Ostrand, the section foreman, jointly, for damages caused by the stone striking plaintiff as above described. Upon a trial the jury returned a verdict in favor of the plaintiff for \$1,500. Defendants appealed from the judgment thereon.

A number of errors are alleged, but from the view we take of the case it is necessary to discuss but one of them. The allegations of negligence in the complaint are as follows:

“That on the 27th day of February, 1901, the plaintiff was in the employ of said defendant corporation, the Northern Pacific Railway Company, as a section hand, and on said 27th day of February, 1901, was engaged for said defendant in riprapping a small dike along the road bed belonging to said defendant corporation at a point on said railroad in the city of Spokane, and at the foot of the bluff opposite Latah Creek, in the said county of Spokane, state of Washington. That plaintiff was working at said riprapping under the immediate direction and supervision of the yard foreman of said defendant, the Northern Pacific Railway Company, viz., the defendant August Ostrand, who had general supervision and control over said work and the men employed thereat, with full power to employ and discharge said men, or any of them, and direct them in their labor for the said defen-

dant corporation; and while so engaged said yard foreman ordered and directed other employees to go upon the side of said bluff, and throw down and roll down stones to the dike, where plaintiff was engaged in riprapping as aforesaid. And while plaintiff was so engaged, and while the said yard foreman was standing in front of plaintiff upon said dike, and facing plaintiff and the men upon said bluff, and so directing all of them, and watching and giving warning to the plaintiff of the rolling stones so rolled and thrown down as aforesaid, one of the men upon said bluff dug out and rolled down with great velocity upon plaintiff, from a point high up on said bluff, without the hearing and out of the sight of plaintiff, a large stone; and the said yard foreman, then and there charged with the duty of warning plaintiff of danger from the said rolling stones, and standing in full and plain view of same and of plaintiff's danger, and having knowledge of the same, failed and refused to give warning or to notify plaintiff of said danger, though he had ample time and opportunity to do so, and although he knew that the danger was unobservable by the plaintiff as he was then engaged."

The negligence here charged is that the plaintiff had no knowledge of the danger, and that the foreman, Ostrand, had knowledge of the danger, and neglected and failed to warn plaintiff thereof. The evidence of the plaintiff was the only evidence in the case upon this point, and was substantially as follows:

"I had thrown up a dike about four feet long, or five, of sand; and by the time I perhaps would get one that long and a foot high, practically the first of it that I put up would have been washed away. So I reached over to the bank or bluff and picked up a few stones and placed against the sand—small stones that would weigh six or seven pounds, principally flat ones, and laid them against the sand. And the foreman, Mr. Ostrand, says: 'That's the thing,' or 'That's the stuff,' and he says: 'Boys, get up there, and throw down some stones.' I had gum boots on, and was always in the water, and the other two men

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went up on the bluff a rod or so, and commenced throwing down stones. They would throw first to the right and then to the left of me, and I would throw up six, eight, or ten shovelfuls of sand as fast as I could, and then pick up the stone and riprap the inside of the dike to keep it from being washed away. Mr. Ostrand at this time was standing right in front of me. The side of the bluff was so steep it was quite hard to climb; it was as steep as the sand would remain in its natural state, so that anything round would come down with considerable force. In the meantime the men kept working further and further back up the bluff after more stone. I had my back to them most always. I couldn't work any other way. And I would work quite rapidly, and throw up eight or ten shovels full of sand, and then I would pick up some rocks that they had thrown down, and I would riprap the inside of the dike, and then throw up a foot or two of dike, and so on. I looked on the hill to see what they were doing—what was there. I could see nothing but small rock that was not of much importance, and nothing to be feared, and while I was engaged with my back to the bluff and to the men on the bluff there was a stone that would weigh from sixty to one hundred pounds came down, and just as it came Mr. Ostrand says, 'Look out,' and I turned my head, and just as I turned my head to look it plunged into the water, and threw the sand and water into my eyes and all over me, and I could not see; so I just put my right foot up on top of the dike, and just commenced to raise my left foot, when the rock caught me right between the dike and crushed my leg. Mr. Ostrand at this time was standing probably four feet in front of me, about a foot or two to the right of me. The other two men were probably sixty yards from me upon the bluff. The wind was blowing, and the water was making quite a noise. The rocks coming down would make no noise. Mr. Ostrand was facing the men on the bluff, and there was nothing to obstruct his view. Where he stood it was just a level and smooth sand bar, the same as where I was, except this dike was between us. When I went to work, I thought there might be some large stones, after they commenced to

throw them down, and I looked up on the bluff to see if there was anything there of any size that would be dangerous, and I could see nothing that was large enough to do any damage; small stones weighing six, eight or ten pounds, some place along there.”

Plaintiff also testified that no warning of any kind had been given while the men were throwing down small stones, because no stones of any size had come down, and there was no occasion for warning. The foregoing contains the substance of all the evidence of the plaintiff upon the question of negligence. At the close of the plaintiff's case each of the defendants moved the court to discharge the jury and dismiss the case upon the ground that there was not sufficient evidence to make out a *prima facie* case. We think this motion should have been granted. There was certainly no evidence that the defendant railway company was negligent, unless Ostrand, the foreman, was negligent. The negligence of Ostrand alleged in the complaint was that he knew of the danger, and failed to notify plaintiff thereof. The evidence does not show that Ostrand knew of the danger prior to his cry of warning, which was given too late for plaintiff to escape the injury. It does show that Ostrand was in plain view of the men on the hill. It also shows that there was no apparent danger, and that plaintiff himself had the same opportunities for seeing and knowing the danger and the character of the rocks on the hill side that Ostrand had, and that no warning had been given, and none was necessary, because the size of the rocks being rolled down was not sufficient to make them dangerous. It is not shown that Ostrand knew that there were any large or dangerous rocks within reach of the men on the bluff, or that he had ordered rocks of this size, or this particular rock, thrown down, or knew, prior to his warning, that it was coming. In fact, plaintiff testified that in the prosecution of the work they

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had no use for such a rock. It was no doubt negligence for the man who started the rock to roll it without warning plaintiff or the foreman, and if he had been ordered by the foreman, or if the foreman knew that the men were about to roll down this rock or other rocks of a sufficient size to be dangerous, and plaintiff was not warned thereof, the master would have been liable, under the rule announced in *Nelson v. Willey Steamship & Navigation Co.*, 26 Wash. 548 (67 Pac. 237). But where the evidence shows that the foreman himself did not know of the danger, and had no reason to suspect danger, the negligence alleged was not proven.

But it is said that it was the duty of the foreman to watch the men on the bluff, and warn plaintiff of danger, and that, if he did not see the danger, it was his duty to see it, and he was negligent for that reason. Conceding that implied knowledge may be shown under the allegations of negligence in the complaint, still we think the evidence is not sufficient. If defendants are liable at all, they are liable because of some neglect of duty owing from defendants to plaintiff. It was the duty of the defendants to furnish plaintiff a reasonably safe place in which to work. They were not obliged to guaranty the safety of the place, but they were in duty bound to make a reasonable inspection of the place; and, if that inspection was made, and failed to disclose any danger, there could be no negligence in that respect. Or, if danger was to be apprehended by reason of the men on the bluff rolling stones down, which would endanger the life or limbs of the plaintiff, then it was the duty of the defendants to guard the workmen who could not guard themselves. No danger was apparent in this case, because the rocks suitable for the work were not dangerous as they were thrown down. The plaintiff testified that before he went to work he looked

to see if there were any rocks of any size upon the bluff, and he could see nothing but small stones, not large enough to do any damage. He was a man of experience, having been engaged in this work for two years, and probably as competent to judge of danger as his foreman. His inspection was the inspection of a reasonably careful man. The foreman, no doubt, also inspected the ground in the same way for the same purpose, and saw the same as the plaintiff saw, and came to the same conclusion. The evidence is silent as to what the foreman did in this respect, but it is fair to presume, in the absence of evidence upon the subject, that he made the same inspection, and obtained no more knowledge than was obvious and open to plaintiff. When the danger is not known, and not suspected, and where there are no circumstances which would cause a reasonably careful man to investigate and ascertain the danger, the law will not impute knowledge of danger where the knowledge is not shown in fact. When reasonably careful men conduct their business in a reasonably careful manner, there is no negligence. The evidence in this case shows that Ostrand had no reason to believe that there were any dangerous rocks on the bluff, and certainly there was no evidence tending to show that he knew, or should have known, that one of the men on the bluff would find a large, dangerous, hidden rock, unsuitable for the work in hand, and roll it down upon plaintiff without orders and without warning. If there was in fact any negligence, it was the negligence of a fellow servant, for whose acts the defendants are not liable.

The court below should have sustained defendants' motion. For this reason the cause is reversed, and ordered dismissed.

FULLERTON, C. J., and DUNBAR and ANDERS, JJ., concur.

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Syllabus.

[No. 4400. Decided February 18, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. W. A.
LEWIS, *Appellant*.

81	75
82	292
81	75
86	806

JURORS — COMPETENCY — WAIVER OF OBJECTIONS.

Under Bal. Code, § 4736, which provides that the verdict of a jury shall not be affected by reason of the incompetency of a juror, unless the juror was challenged for specific cause before verdict, a ground of objection to a juror will be deemed waived when the specific point was not urged as the basis of a challenge.

SAME — JUSTICE OF PEACE AS JUROR — GROUND OF CHALLENGE.

The provision of Bal. Code, § 4736, that judicial officers shall not be compelled to serve as jurors is merely a privilege granted such officers, and is not a ground of challenge for cause.

SAME.

The fact that the prosecuting attorney is the legal adviser of justices of the peace, and that a juror may have had cases before him as justice in which the prosecuting attorney was engaged for the state, would be too remote to disqualify a justice of the peace from sitting as a juror in a criminal case, when no special personal relations are shown to exist between the juror and the prosecuting attorney.

EMBEZZLEMENT — CLAIM OF LIEN FOR ATTORNEY'S FEES — GOOD FAITH — QUESTION FOR JURY.

In a prosecution of an attorney for the embezzlement of funds belonging to a client, the court is warranted in submitting the cause to the jury, although there may be a civil action pending between the attorney and his client involving the right to such funds under a claim of lien, when there is evidence tending to show that the claim of lien was not asserted in good faith.

SAME — EVIDENCE.

Under an information charging the embezzlement of a specific sum of money, proof of the receipt and conversion of a part of the fund is sufficient to sustain a conviction.

CRIMINAL LAW — INFORMATION — BILL OF PARTICULARS.

The denial of a bill of particulars upon a prosecution for larceny by embezzlement was not error, when the information showed that the defendant received certain property as an agent for another, which he fraudulently converted to his own use, and set forth a description of the specific property converted, with the time and manner of its receipt.

SAME — PROSECUTION FOR EMBEZZLEMENT — ELECTION BETWEEN CHARGES.

In a prosecution for embezzlement, a motion requiring the state to elect whether it relied upon the fiduciary relation of attorney and client, or of principal and agent was fully met by the state's announcement that it elected to rely upon the fiduciary relation of principal and agent, and not that of attorney and client.

SAME — PLEA OF FORMER ACQUITTAL — REPLY UNNECESSARY.

A plea of former acquittal does not stand admitted by reason of a failure to reply thereto, in the absence of a statute requiring the denial of such a plea.

SAME — ALLEGATIONS OF PLEA.

Semble, that under Bal. Code, § 6900, requiring a plea of former acquittal to state the date of judgment, the absence of such allegation would render the plea bad.

SAME — INSTRUCTIONS.

In a prosecution for embezzlement in which the state relied upon the relation of agency instead of that of attorney and client, the use of the descriptive word "attorney" in the court's charge, in referring to the defendant, would not constitute error, where the gist of the instruction dealt with the relation of agency.

SAME — MEET WITNESS FACE TO FACE — WAIVER.

A defendant's constitutional right to have the witnesses against him produced in court may be waived; and an agreement by a defendant, in order to avoid a continuance, that one of the state's absent witnesses would testify to certain facts would constitute such waiver.

SAME — EVIDENCE — ADMISSIBILITY OF ACCOUNT BOOKS.

In the prosecution of an attorney for the embezzlement of his client's money, the office books of defendant's firm, containing accounts with their general clientage, including the prosecuting witness, were properly excluded, where they contained self-serving entries made without the knowledge of the prosecuting witness.

Appeal from Superior Court, Spokane County.—Hon. FRANK H. RUDKIN, Judge. Affirmed.

Feb. 1903.] Opinion of the Court.—HADLEY, J.

T. C. Griffiths and *W. S. Lewis*. for appellant.

Horace Kimball, Prosecuting Attorney, and *Miles Poindexter*, for the State.

The opinion of the court was delivered by

HADLEY, J.—Appellant was, by information, charged with the crime of larceny. The substance of the charge is that on the 12th day of June, 1900, the appellant was the agent and attorney of one Mary Lambert, and was, by virtue of being such agent and attorney, intrusted by the clerk of the superior court of Spokane county with the sum of \$225 of bank notes, money and currency of the United States, of the value of \$225, the same being the property of said Mary Lambert; that by virtue of being such agent and attorney, appellant had authority to receive said money and did so receive it in the name and on account of the said Mary Lambert, and that he thereafter unlawfully converted the same to his own use. Appellant entered the pleas of not guilty and of former acquittal. A trial was had before a jury, resulting in a verdict of guilty. Motions for new trial and in arrest of judgment were denied, and judgment was entered upon the verdict of the jury, whereby appellant was sentenced to serve a term of eight years and six months' imprisonment in the state penitentiary. From said judgment this appeal is prosecuted.

It is assigned as error that the court denied appellant's challenge to the juror Salisbury on the ground that he was at the time a judicial officer of the state of Washington, namely, a justice of the peace. The examination shows that the juror is by occupation a farmer, but that he was then filling the office of justice of the peace in his precinct. Appellant had passed him for cause, and after examining another, the point was urged against Mr. Salis-

bury that as a justice of the peace he was subject to the occasional advice of the prosecuting attorney. It was not urged at the time that the mere fact that he was a justice of the peace would disqualify him, but it was suggested that it was a privilege which he could claim. It is now urged here that, under § 4736, Bal. Code, the juror was actually disqualified on the ground that he was a judicial officer. Even if appellant's contention as to the force of the statute should prevail, still, since the specific point was not urged below, we think it was waived, and the section cited expressly provides that the verdict of the jury shall not be affected unless the juror was challenged for the specific cause before the finding of the verdict. But, in any event, even if the point had been timely raised by specific challenge, we think the statute will not bear the construction urged by appellant. The statute plainly makes it a mere privilege of the persons therein specified to claim exemption from jury service. The essential provision is that they "shall not be compelled to serve as jurors." The mere fact that the section directs county commissioners to omit the names of such persons from jury lists prepared by them does not work an actual disqualification of the persons coming within the classifications named, if they have happened to be included in the list, and do not claim the privilege of exemption. The further ground of challenge, that the prosecuting attorney is the legal adviser of county officers, including justices of the peace, and that the juror may also have had cases before him as justice of the peace in which the prosecuting attorney happened to be engaged for the state, is too remote in itself to disqualify the juror. Unless the examination disclosed such special and peculiar personal relations as would seem to make it imprudent for him to act, it should not be held as ground of challenge for cause. No such

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relations are shown in this record, and we think the challenge for cause was in all particulars properly denied.

It is assigned that the court erred in denying appellant's motion to require the state to furnish a bill of particulars, and also to elect whether it relied upon the fiduciary relation of attorney and client, or that of principal and agent, since it was alleged in the information that appellant was both the attorney and agent of the said Mary Lambert. The motion for bill of particulars was denied, and, in response to appellant's motion, the state announced that it elected to rely upon the fiduciary relation of principal and agent, and not that of attorney and client. We think the election which was made by the state fully met the requirements of appellant's motion to require an election. And as to the motion for a bill of particulars, we think the information sufficiently advised appellant of the material facts, within the holding of this court in *State v. Turner*, 10 Wash. 94 (38 Pac. 864). The essential elements of the information, as summarized in the above case, are that the accused shall be shown to be a person or an agent, and if an agent, he shall have received the property of his principal by virtue of the agency, and that he fraudulently and feloniously converted it to his own use. All this appears in the information in the case at bar. The specific property received and converted is described and the time and manner of its receipt are also described. It does not appear that more specific information could have been furnished by a bill of particulars, and it was, therefore, not error to deny it.

It is assigned that the court erred in submitting this cause to the jury, inasmuch as it appeared from the evidence that a civil action is pending between the appellant and the prosecuting witness, involving a dispute over the appellant's right to possession of the same property, the

alleged conversion of which constitutes the basis of this prosecution. It is contended by appellant that a determination of the legal rights of the respective parties in the civil suit concerning the funds in controversy must be had before the appellant can be prosecuted for the embezzlement thereof. Appellant's position is that there is no provision in the law of criminal procedure which warrants a plea in abatement of a criminal action because of the pendency of a prior civil action involving the same subject matter, and that for the above reason appellant was relegated to proof of the fact under the general issue. Evidence was accordingly introduced with the view of establishing the fact that a *bona fide* controversy exists in relation to these funds, which is now in process of litigation, and which is yet undetermined. The evidence bearing upon the point urged here by appellant shows substantially that the prosecuting witness, Mary Lambert, some years ago recovered a judgment in the superior court of Spokane county against Carrie N. Gillette. The attorneys who procured the judgment not having succeeded in collecting the same, she employed appellant as an attorney for an agreed fee of \$10 to examine the records, and investigate the probability of collecting the debt. The \$10 fee was paid, and, after investigation, a written agreement was entered into between Mrs. Lambert and appellant whereby appellant undertook the enforcement of the judgment for an agreed fee of one-half of all that should be recovered thereon, she agreeing to pay the necessary costs attending the enforcement of the judgment. In pursuance of said agreement execution was issued, and real estate was sold thereunder in satisfaction of the judgment. The interest of appellant was transferred to W. S. Lewis, then a law student in appellant's office, and later his law partner in a firm known as "Lewis & Lewis."

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The sheriff's conveyance was made to Mary Lambert and W. S. Lewis jointly. Later it was discovered that pending the enforcement of the judgment the judgment debtor had conveyed a portion of the real estate; that an attempted satisfaction of the judgment had been made, and that the purchaser had commenced the erection of valuable improvements upon a portion of the land so sold. Thereafter an action was instituted by the firm of Lewis & Lewis to set aside the purported release, to quiet title and for possession of the lot under the sheriff's deed. Appellant contends that a new agreement was then made, by which Mrs. Lambert was to pay one-half and W. S. Lewis the other half of the reasonable attorney's fees and necessary costs and disbursements of this new litigation, and that the former written agreement related only to the issuance of execution and the sale of the property under the judgment previously obtained by other attorneys as aforesaid. The prosecuting witness contends that it was understood that the written agreement comprehended all the necessary legal services to effect a final recovery under the judgment, and that the suit to quiet title was a part of that service. The evidence shows that Mrs. Lambert did pay one-half of at least a portion of the costs and disbursements, but appellant contends that she did not pay as much as was paid out for her by Lewis & Lewis by \$64.15. The litigation included the costs of an appeal to this court. During this time Mrs. Lambert and one Mrs. Muerling were conducting a lodging house as co-partners. Dissension arose between the partners, and Mrs. Muerling commenced an action to dissolve the partnership, and for the appointment of a receiver of the firm business and property. The firm of Lewis & Lewis were employed by Mrs. Lambert to defend that action. During the progress of that litigation, on stipulation of the parties, the part-

nership property was sold for \$950, and the proceeds deposited in the office of the clerk of the superior court to await final adjudication of the case. On such final adjudication Mrs. Lambert was awarded \$325 of this fund. It was agreed by successive stipulations between the respective counsel in the case that these funds should be withdrawn from the clerk's office. Appellant drew \$100 of Mrs. Lambert's share on October 16, 1899, and on June 12, 1900, he drew the remaining \$225. The charge in this case is based upon the alleged embezzlement of the last-named amount. It is appellant's contention that his law firm had a claim of lien upon said fund for services as attorneys in the case of *Muerling v. Lambert* above mentioned, and also for services rendered and for money expended in the litigation to quiet title heretofore mentioned; that prior to the institution of this prosecution a suit was begun to establish and enforce such lien, and that pending the determination of that controversy this criminal prosecution cannot be waged. It was the view of the trial court that, while appellant is entitled to a lien upon the funds in his hands for attorney's fees for services rendered, yet it was for the jury in this case to determine under the evidence whether the appellant had fraudulently converted to his own use funds which he did not in good faith claim as attorney's fees. Upon that subject the court instructed the jury as follows:

"If the defendant W. A. Lewis in good faith claimed a lien upon the moneys of Mary Lambert in his hands for a general balance due him, or the firm of which he was a member, as attorneys' fees for services performed by the said W. A. Lewis or the firm of which he was a member for the said Mary Lambert, the mere fact that the defendant retained the whole of said money in his possession and failed or refused to turn the same over to the said Mary Lambert until the amount of said claim for

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attorneys' fees should be adjusted and paid would not of itself constitute an offense under the law, but you must further find from the testimony that the defendant fraudulently converted to his own use moneys belonging to the prosecuting witness Mary Lambert, which he did not in good faith claim as attorneys' fees."

A claim of lien, not made in good faith, cannot be a good defense. A claim of lien confers no right to convert the funds to one's own use, but merely a right to hold them until the claim is settled; and it would be possible for one to assert a claim of lien not in good faith, in order that he might retain possession of the funds, and thus avoid any immediate disclosure of an actual conversion thereof. It is undisputed that appellant withdrew the the last of these funds from the clerk's office on the 12th day of June, 1900. The complaint in the action to enforce the alleged lien was verified May 28, 1901, nearly one year after the balance of the funds came into appellant's possession. The testimony of the prosecuting witness is that she did not know of the withdrawal of the money by appellant at the time, and that appellant repeatedly told her the money must remain in the clerk's office until the determination of her motion for new trial, and pending her appeal if she should appeal to this court; that she learned that Mrs. Muerling had received her money, and, upon asking appellant why she could not also receive hers, he replied that, if Mrs. Muerling had withdrawn her money, she must have given a bond, but that Mrs. Lambert could not withdraw hers without dropping all further proceedings in the case; that similar statements were repeated, and that in January, 1901, she told appellant she would go to the clerk's office and inquire about getting the money herself; that thereupon appellant replied, "If you dare to do that, Mrs. Lambert, I will fine you for contempt of

court"; that forthwith, after said conversation, she went to the clerk's office herself, and then discovered that appellant had long been in possession of all her funds, the last having been withdrawn more than six months prior to that time. Some months after that, the suit to enforce the alleged lien was begun. Appellant, it is true, testified that Mrs. Lambert was advised of the withdrawal of the money. Mrs. Lambert testifies that she had paid appellant and his law firm in full for all services in the Muerling case under an express agreement as to the amount when the last payment was made, and that she owed nothing for services in the Gillette litigation, because of the written agreement whereby appellant was to perform the necessary attorney's services for one-half of what should be recovered upon the judgment. Under all these circumstances we think it became as properly the province of the jury in this case to determine whether the claim of lien was asserted in good faith, as if no civil suit concerning the same had been instituted. The evidence upon the subject was all before the jury, and the question of good faith was squarely submitted to them. In *State v. Maines*, 26 Wash. 160 (66 Pac. 431) an agent was to receive as commissions a certain percentage on the amount of sales made. This court held that all the money belonged to the principal until there was an accounting, and by consent of the principal the agent was permitted to retain a given amount. It was urged in that case that, because of his right to commissions, the agent became a joint owner with his principal of the funds in his hands, and that embezzlement could not be predicated upon a holding of joint funds. We held against the contention that it was a joint ownership, and followed what we recognized as strong authorities, which are cited in the opinion. There was no dispute as to the agent's right to commissions, but his failure to account to

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his principal at the time required by his contract with him was submitted to the jury as a fact from which they were to determine the question of good faith, and whether there was an actual conversion or not. In the case at bar there is no claim of joint ownership. The funds are conceded to belong to the prosecuting witness, but appellant claims a right of lien against them. In the *Maines Case* the agent's right to a portion of the funds on an accounting was not disputed, and yet the jury found that the funds were not retained in good faith and that there was a conversion. In this case appellant's right to any portion of the funds upon an accounting is disputed, and we think the question of conversion, under the evidence, was as properly for the jury as it was in the *Maines Case*. While appellant asserted a right of lien, yet it was for the jury to say whether it was asserted in good faith or not. It may be remarked here that at the time of the commencement of the civil action to enforce a lien appellant deposited in court the sum of \$125 as the sum which he claimed was due to Mrs. Lambert in excess of all claims for lien. He had received in all \$325, and claimed a lien for \$200. Thus the \$125 which he admits was due to Mrs. Lambert he held for about one year after it came into his possession. This circumstance, taken together with the testimony on behalf of the state that no sum whatever was due him as attorney's fees, we think left it peculiarly for the jury to determine whether there was an actual conversion of the funds by appellant at the time alleged in the information, to wit, June 12, 1900.

Error is assigned upon the ground that the state did not traverse appellant's plea of former acquittal, and it is urged that the plea therefore stands confessed. It has been held that, when the plea of former acquittal is not bad upon its face, it can be avoided only by replication. *State v.*

Clenny, 1 Head (Tenn.) 271; *Murphy v. State*, 25 Neb. 807 (41 N. W. 792). Again, it is held that a replication is implied. *State v. Swepson*, 81 N. C. 571; *Vowells v. Commonwealth*, 83 Ky. 193. In *State v. Howe*, 27 Ore. 138 (44 Pac. 672), it was held that when there is no statute requiring a reply to a plea of former acquittal, no reply is required. We think the above rule the correct one in this state, since our criminal procedure is governed by statute. Provision is made by statute for the plea of former acquittal, but no provision is made for a reply thereto. The state contends that the plea in the case at bar is, upon its face, insufficient, for the reason that it does not specify any date of the judgment under which former acquittal is claimed. Section 6900, Bal. Code, seems to make it a requirement of such a plea that it shall state such a date, and it has been held in California that under a statute requiring a statement of the time of the former judgment in a plea of former acquittal the absence of the statutory requirements rendered the plea bad, and that it was not necessary for the jury to find on that subject. *People v. O'Leary*, 77 Cal. 30 (18 Pac. 856).

The only record evidence upon this subject shows a mere dismissal by the prosecuting attorney of another charge against appellant, which appellant claims was for the same offense covered by the information in the case at bar. The state insists that the offense charged in the first information is not the same as that charged here. But, even conceding that it may be the same, the order of dismissal was not a bar to another prosecution for the same offense, since the offense charged is a felony. Section 6916, Bal. Code. Even if the pleadings had properly presented the issue of former acquittal, there was, as we have seen, no competent evidence to support it, and therefore nothing to submit to the jury upon that subject.

Error is assigned that the court, in effect, instructed the jury that evidence of the receipt and conversion of a part of the fund described in the information will satisfy the requirements of the information. It is urged that, since the charge describes an integral sum, viz., "the sum of two hundred and twenty-five dollars of bank notes, money, and currency of the United States," the proof must strictly show the conversion of that sum.

"The prosecution is not held to strict proof as to the number, quantity, or value of the articles, whether the indictment charges the embezzlement of money or of other property." 7 Enc. Pl. & Pr., 454.

The cases cited in support of the above text hold that proof of either a smaller or larger amount than that specified in the charge will sustain a conviction. The court, therefore, did not err in the particular named.

It is assigned that the court erred in its instruction wherein the word "attorney" was used in describing appellant, it being contended that the state had elected to rely upon the relation of agency, and not upon that of attorney and client. While the word may have been used as descriptive of appellant, yet the gist of the instruction was that, if they found that W. A. Lewis received the money, and was intrusted therewith on account of Mrs. Lambert, he thereby became the agent of the owner. W. A. Lewis was a person, and, as such, if he was intrusted with money on account of the prosecuting witness, he thereby became her agent. There was no material error in the instruction.

Error in the court's instructions on the subject of attorney's liens is assigned. The instructions come within the views of the court heretofore expressed in the discussion of the subject of good faith in the assertion of the lien. We will, therefore, not pursue that discussion further. Further error is alleged upon the refusal of the court to

give certain requested instructions upon that branch of the case, but we think the law of the subject was covered by the instructions given, and that no error was committed in the refusal to give those requested.

It is urged as error that the agreed testimony of James A. Drain was admitted. An affidavit for continuance on behalf of the state was presented before the beginning of the trial, showing the absence of said witness from the state, and also showing what would be his testimony if present. It was agreed by the defendant that, subject to objections for immateriality and incompetency, the affidavit might be considered as testimony actually given by the witness at the trial. The testimony was material, since it related to the payment of the money by the witness, as clerk, to appellant. We therefore think it was not error to admit it. A defendant may waive his constitutional right to have the witnesses produced against him. Wharton, *Criminal Pleading & Practice* (9th ed.), § 595; *State v. Wagner*, 78 Mo. 644 (47 Am. Rep. 131); *Hancock v. State*, 14 Tex. App. 392. Appellant waived that right in this case by his ante-trial agreement. The testimony as to the fact of payment by the witness to appellant is not, however, disputed. The only additional element in the testimony is that he paid appellant "bank notes, money, and currency of the United States," and the time of the payment is also stated. Thus the testimony described the property, was all material under the issues, and was properly admitted under the appellant's waiver.

It is urged as error that the court refused admission in evidence of some large, leather-bound books or journals which appear to have been the office books of the appellant and his firm, containing accounts with their general clientele. Portions of the books were also specially offered, containing accounts with Mrs. Lambert. We think these

were all properly excluded. They contained merely the entries of appellant and his law firm, made without knowledge of the prosecuting witness, and amounted to no more than unsworn statements, which were objectionable on the ground of being self-serving in their nature.

Error upon the personal conduct of both the court and the prosecuting attorney during the progress of the trial is assigned; but we do not find in the record anything of that nature which we believe amounted to reversible error, or which calls for our criticism here.

The principal errors have been discussed. Many questions involved in other errors assigned have been more or less discussed in this opinion, and we do not believe any good purpose will be served by a further discussion of the matters urged.

It is insisted that an excessive sentence was imposed by the trial court, and that it erred in that behalf. The sentence is, however, for a period within the limitation of the statute, and we shall not disturb the judgment on that ground from anything that appears in the record.

The judgment is affirmed.

FULLERTON, C. J., and MOUNT, DUNBAR and ANDERS, JJ., concur.

[No. 4409. Decided February 18, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE BAILEY, *Appellant*.

RAPE — SUFFICIENCY OF EVIDENCE.

A verdict of guilty in a prosecution for rape will not be disturbed, although the testimony of the prosecuting witness may have been contradictory in some particulars, where it appears

81	89
86	284
31	89
230	205
31	89
41	625
31	89
42	312

that she was a child of twelve years of age, apparently confused and embarrassed by her position as witness and by the nature of the examination, and where her statements as to the commission of the crime are supported by corroborative testimony.

SAME — IMPOTENCY.

Where the only evidence as to the impotency of a defendant charged with rape is his own testimony, a verdict of guilty will not be disturbed, when there is evidence tending to establish the material facts showing guilt.

SAME — EXCLUSION OF TESTIMONY.

Testimony of a witness as to statements made to him by a defendant charged with rape concerning the latter's impotency was properly excluded, where the question was general and indefinite as to time.

WITNESSES — CAPACITY OF CHILD TO TESTIFY — DISCRETION OF COURT.

The capacity of a witness of tender years to understand the nature of an oath is a question for the discretion of the trial judge, and will be disturbed on appeal only in cases where the record shows manifest abuse of discretion.

SAME — CROSS-EXAMINATION.

Where a witness had not been examined in chief as to complaints made by the prosecutrix at police headquarters as to pains or injuries sustained by her as the result of an alleged rape, cross-examination on the subject was not proper.

TRIAL — MISCONDUCT OF PROSECUTING ATTORNEY.

Misconduct of counsel cannot be urged on appeal, unless the trial court was asked to correct it, and to properly instruct the jury concerning same, followed by exception in case of the court's refusal.

SAME — INSTRUCTIONS — CHARGE AS TO LESSEER OFFENSES.

Where there is no evidence tending to support lesser offenses than that charged in the information, it is not error for the court to fail to instruct the jury that they may return a verdict of guilty of the lesser offenses.

Appeal from Superior Court, King County.—Hon. ARTHUR E. GRIFFIN, Judge. Affirmed.

Robert Welch (*James Hamilton Lewis* and *Alex S. Jeffs*, of counsel), for appellant.

Feb. 1903.] Opinion of the Court.—HADLEY, J.

Walter S. Fulton, Prosecuting Attorney, and *Vince H. Faben*, for the State.

The opinion of the court was delivered by

HADLEY, J.—Appellant was tried for the crime of rape, and a verdict of guilty was returned by the jury. A motion for new trial was denied, and judgment rendered upon the verdict, imposing a sentence of twelve years' imprisonment in the penitentiary. From said judgment this appeal is prosecuted.

It is first assigned as error that the verdict is unsupported by the testimony. It is urged that the testimony of the prosecuting witness is contradictory to the extent of being self-destructive. While her testimony may have seemed contradictory in some particulars, yet we think upon the whole record it is reasonable to conclude that the apparent inaccuracies were due to a misunderstanding upon her part as to portions of her examination. She was but a child of twelve years of age, and we think it reasonably appears from the record that she may have been embarrassed to the extent of showing some apparent confusion. Other corroborative testimony is such, however, that we think her testimony can by no means be said to be self-destructive. The appellant is a man of mature years, and was fifty years of age at the time of the alleged crime. The evidence shows, without contradiction, that the two were together in appellant's sleeping room at night; that both were disrobed, and had been together occupying the appellant's bed. The officers found them both in a disrobed condition when they entered the room, and appellant himself admits that they had been occupying the bed together. The child testified, and in this she is corroborated by the woman who kept the place, that she went to appellant's lodging house in search of her sister, who, it

appears, had been lodging there for a time. Appellant knew her sister, and the child met him in the hall, and they talked about the sister. While waiting for the sister, she entered appellant's room. She remarked that she was hungry, and appellant went out and procured some food, which he brought to the room, and which she ate there. Soon after this, appellant left the room for a short time, and during his absence the child testifies that she felt ill and "threw up" what she had eaten. Upon appellant's return she told him of her illness, and he then gave her a glass of beer, a small portion of which she drank. There is no dispute as to the above-stated facts. The child further testified that soon after appellant's return to the room he locked the door, disrobed himself, and forcibly disrobed her, keeping his hand over her mouth meanwhile, and thereafter forcibly accomplished his purpose, which she plainly describes in her testimony. Appellant denies all this. He admits, however, that they were occupying the bed together when the officers rapped upon the room door, but denies any assault upon the child's person. While parts of the child's testimony may have seemed contradictory upon the subject of the accomplishment of the actual assault, yet her positive testimony upon that subject, we believe, was given in the light of a fuller understanding of the matter about which she was then interrogated, the apparent confusion being due, perhaps, to her extreme youth and to her embarrassment under her surroundings. Her testimony upon that subject, taken together with the attendant circumstances already detailed, was such as came within the peculiar province of the jury to weigh, and it cannot be said as a matter of law that it does not support the verdict.

It is further urged that the verdict is unsupported by the evidence because of certain testimony concerning the

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alleged impotency of the appellant. The evidence upon that matter was subject to being weighed by the jury as any other evidence. The only testimony of a positive nature upon that subject was that of the appellant himself. The testimony of a physician introduced by appellant upon that matter was to the effect that he could not say that appellant was impotent from any physical appearances which he discovered upon a personal examination. The jury heard the testimony of appellant, and it was for them to pass upon its truthfulness when considered with all other facts and circumstances in evidence before them. It has been held by this court that a verdict will not be disturbed if there is evidence tending to establish the material facts necessary to show the guilt of the accused. *State v. Kroenert*, 13 Wash. 644 (43 Pac. 876); *State v. Murphy*, 15 Wash. 98 (45 Pac. 729); *State v. Maldonado*, 21 Wash. 653 (59 Pac. 489); *State v. Coates*, 22 Wash. 601 (61 Pac. 726). There was evidence in the case at bar tending to establish the material facts showing the guilt of the accused, and, unless errors are shown by the record, the verdict will not be disturbed.

It is assigned as error that the court denied appellant's motion to strike the testimony of the prosecuting witness on the ground that she did not understand the nature of an oath. The motion was not made until after the witness had testified in chief, and no objection upon that ground had been previously made to her testimony. But, even if it should be conceded that the objection is entitled to the same consideration it should have received at the beginning of her testimony, we think it sufficiently appears from the record that the witness fully understood the nature of her obligation in the premises. The capacity of a witness of tender years is a question for the discretion of the trial judge, and will not be disturbed except in cases of mani-

fest abuse of discretion. 16 Am. & Eng. Enc. Law (2d ed.), 270. No such abuse of discretion appears in this record.

It is assigned that the court erred in sustaining an objection to a question asked officer Freeman. The witness was present at the office of the captain of the police department when the prosecuting witness was there soon after the commission of the alleged crime. After testifying in chief for the state, he was asked on cross-examination if the little girl made any complaint to the captain of the police about pains or injuries at the time above mentioned. Objection was made that it was not proper cross-examination as to any matter concerning which the witness had testified in chief, and that it was matter of defense. We think it was not error to sustain the objection for the reason above stated.

It is next assigned that the court erred in sustaining an objection to a question asked the witness Stanford. He was asked if the appellant had spoken to him in regard to his condition as to potency. The question was so general and indefinite as to time that the witness might have answered concerning such conversations with appellant occurring as recently as after the commission of the alleged crime, or even during the progress of the trial. Statements so recently made might well be objectionable as self-serving declarations. No question was asked the witness directing his attention to a time prior to the commission of the alleged offense, when such declarations on the part of appellant might be said to be free from the element of a self-serving purpose. It was not error to sustain the objection.

Misconduct of counsel on the part of the state is assigned as error, and a few extracts from the record are suggested as the basis of this assignment. We, however, find no

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objection made to the alleged misconduct at the time it occurred. The court was not asked to correct counsel, and no exception appears in the record upon that subject. Misconduct of counsel cannot be urged here unless the trial court was asked to correct it and to properly instruct the jury concerning the same, followed by exception to the court's refusal so to do. *State v. Regan*, 8 Wash. 506 (36 Pac. 472.)

It is urged as error that the court failed to instruct the jury that they could return a verdict of assault and battery or of simple assault. No such instruction was requested by appellant, but he insists that the court erred in not giving it of its own motion. The court instructed the jury that they could return a verdict of guilty of rape or of assault with intent to commit rape, according as they should determine the facts, the necessary elements of each crime being first described in the instructions. There is no evidence in the record which supports or tends to support common assault and battery or simple assault. The prosecuting witness testified to no facts except those which constitute rape or assault with intent to commit rape, and the appellant denies that he made any assault upon her person of any kind. It cannot be said that a verdict of assault and battery or of simple assault could have been sustained by any evidence in this record. There being no evidence tending to support the lesser offenses named, it was not error for the court to fail to instruct the jury that they could return a verdict of guilty for the lesser offenses. This rule is announced in the following cases: *People v. Chavez*, 103 Cal. 407 (37 Pac. 389); *State v. Wood*, 127 Mo. 412 (27 S. W. 1114). See, also, 10 Enc. Pl. & Pr., 164.

In *State v. Woods*, *supra*, the court observed as follows:

"There was nothing in the evidence calling for an instruction on the lower grade for an assault to kill . . . ; and under such circumstances the court should not invite the jury to find for a lower grade than is made by the evidence."

Other errors are assigned upon the court's refusal to give certain requested instructions, but we think those requested instructions which it was proper to give were sufficiently covered in the instructions given by the court. The charge of the court appears to have been clear, pointed, and comprehensive as to the law governing the essential elements of the case. We think no error was committed either in the refusal to give or in the giving of instructions, and we believe a further detailed discussion thereof is unnecessary.

Finding no error, the judgment is affirmed.

FULLERTON, C. J., and DUNBAR, MOUNT and ANDERS, JJ., concur.

[No. 4576. Decided February 18, 1903.]

THE STATE OF WASHINGTON, *on the Relation of Harry Fuller, v. SUPERIOR COURT OF KING COUNTY, George E. Morris, Judge.*

PROHIBITION, WRIT OF — WHEN LIES — AMOUNT IN CONTROVERSY.

The fact that the superior court has no jurisdiction to try and determine an appeal from a justice of the peace is not ground for the issuance of a writ of prohibition, where the amount in controversy is less than \$200, since the judgment of the superior court is conclusive in such cases, under the constitutional provisions limiting the appellate jurisdiction of the supreme court.

Original Application for Prohibition.

James A. Snoddy, for relator.

Lawrence Sledge, for respondent.

31	96
31	684
31	96
31	597

Feb. 1903.] Opinion of the Court.—DUNBAR, J.

The opinion of the court was delivered by

DUNBAR, J.—This is an application for a writ of prohibition to restrain the Hon. George E. Morris, one of the judges of the superior court of King County, from taking cognizance of a certain cause wherein one J. W. Fiddes was plaintiff and Harry Fuller defendant, said cause having been appealed from the justice of the peace's court in Seattle, King county.

The petition alleges the judgment in the justice's court in favor of petitioner and against the said Fiddes, and a notice of appeal from the judgment to the superior court of King county; that said superior court has no jurisdiction to try and determine said cause upon said appeal or otherwise, and is threatening to act without jurisdiction; that no bond on appeal in said cause has ever been given or filed in said cause in the manner or form required by law, and that the amount involved in said cause is less than \$100, exclusive of costs, interest, and attorney's fees; that there is no adequate remedy at law, because there is no appeal from the judgment in such case. The statement in the petition that the amount involved is less than \$100 renders it unnecessary to discuss the question of the legality of the bond or any other question of practice, as this court will not issue a writ of prohibition to the superior court in an action at law where the amount involved is less than \$200. It is contended by the relator, Fuller, that the case of *State ex rel. Alladio v. Superior Court of King County*, 17 Wash. 54 (48 Pac. 733) sustains the contention that the writ of prohibition will issue from this court to a superior court to prevent its trying a case which is without its jurisdiction. The question discussed in that case was the legality of the notice of appeal and its proper service. It is true it was stated in that case that this court

had previously decided that it had authority to issue the writ in such case, as it no doubt had in some of the earlier cases. But those cases have been overruled since that time by this court in many instances. In *State ex rel. McIntyre v. Superior Court of Spokane County*, 21 Wash. 108 (57 Pac. 352), this question was squarely presented in a mandamus case where the case of *State ex rel. Shannon v. Hunter*, 3 Wash. 92 (27 Pac. 1076) was overruled in this particular, and the court, in concluding its argument said:

"It is true that the constitution (art. 4, § 4) provides that the supreme court shall have original jurisdiction in habeas corpus, quo warranto and mandamus as to all state officers; but that provision must be construed in relation to the other provision just mentioned, which was intended as a limitation upon the jurisdiction of the supreme court. [The provision referred to was the constitutional provision that this court shall not have appellate jurisdiction where the amount in controversy does not exceed the sum of \$200, with certain exceptions.] It certainly was not the intention of the framers of the constitution, and would not be in harmony with any consistent theory of adjudication, to hold that a litigant could obtain the opinion of this court by mandamus upon a question of law, where he would be precluded from obtaining it upon appeal; . . . The idea of the constitution evidently is that cases involving small amounts can safely be entrusted to the final judgment of the superior court, and that as to such cases the superior court is the court of final determination."

This case was followed by *State ex rel. Gillette v. Superior Court of Spokane County*, 22 Wash. 496 (61 Pac. 158), which was an application for a writ of review, and the court in that case, in refusing the writ, said:

"The constitution provides that, except in certain cases specifically mentioned, the appellate jurisdiction of this court shall not extend to cases where the original amount in controversy or the value of the property does not exceed the sum of \$200, and we have frequently decided that a

party litigant cannot by indirection obtain a review of his cause which he cannot obtain directly by appeal. It was evidently the intention of the constitution makers that the superior court should have exclusive jurisdiction in actions where the original amount in controversy did not exceed \$200."

It is argued by the petitioner that these cases are not in point, for the reason that one was an application for a writ of review, and the other for a writ of mandamus. But this argument is not sound. If we should grant the writ of prohibition in this case, it would, in effect, be a review of the judgment of the superior court on a question of statutory law, and the result would be (what we said in the case above cited should not be) that the relator would obtain by indirection what he could not obtain directly by appeal, viz., the judgment of this court on the action of the judge of the superior court in a cause involving less than \$200. Prohibition is the counterpart of mandamus. This must necessarily be so from the nature of the remedies, and is so especially pronounced by the statute. § 5769, Bal. Code. It frequently occurs that one superior court in the state will refuse to entertain jurisdiction of a particular cause, while another superior court entertains jurisdiction of a similar cause. Could it be said that this court, in passing upon the principles involved, which are identical in the two cases, would hold that the judgment of the superior court in the case where it refused to entertain jurisdiction and try the cause was final and conclusive, while the judgment of the court which was entertaining the cause and assuming jurisdiction should be reviewed by this court? Such a conclusion is illogical, and would result in confusion and wrong. The two cases of *McIntyre v. Superior Court* and *Gillette v. Superior Court*, *supra*, are again reviewed in *State ex rel. Wallace v. Superior Court of King County*,

24 Wash. 605 (64 Pac. 778), and the doctrine again announced that the judgment of the superior court is conclusive in controversies where the amount involved is less than \$200; and where it was again said that the relator was without remedy under the provisions of the Constitution, that matters not involving \$200 are submitted to the judgment and discretion of the superior court, and that a party cannot by indirection obtain a review by this court of a proposition of law, a review of which he could not obtain directly by appeal. But, in addition to this, the same rule was announced by this court in the late case of *State ex rel. Carrau v. Superior Court of King County*, 30 Wash. 700 (71 Pac. 648), a prohibition case.

The petition will be denied.

FULLERTON, C. J., and MOUNT and HADLEY, JJ.,
concur.

[No. 4436. Decided February 20, 1903.]

STANDARD GOLD MINING COMPANY, *Respondent*, v. W. M.

BYERS, *Appellant*.

TITLE TO OFFICE — DETERMINATION IN REPLEVIN SUIT — INJUNCTION.

The title to a corporate office cannot be tried in an action of replevin to recover the personal property of the corporation from an officer in possession of the office and performing its duties under a *bona fide* claim of right; hence an order of the court granting a temporary mandatory injunction directing the incumbent to turn over all the property and insignia of his office to a third party pending the determination of such action was erroneous.

Appeal from Superior Court, Spokane County.—Hon.
GEORGE W. BELT, Judge. Reversed.

Crow & Williams, for appellant.

Stoll & Macdonald, for respondent.

Feb. 1903.] Opinion of the Court.—MOUNT, J.

The opinion of the court was delivered by

MOUNT, J.—This action was brought by the respondent (plaintiff below) against the appellant (defendant below) for the possession of certain books, papers, and moneys belonging to the respondent. It appears that the property sued for came into possession of the appellant as secretary and treasurer of the respondent corporation. It is alleged in the complaint "that on the 6th day of November, 1901, the defendant's term of office as such secretary and treasurer terminated, and his successor, James Dawson, Esquire, was duly elected by the trustees of the plaintiff corporation, and thereupon he duly qualified as such secretary and treasurer, and the defendant was notified of such election and qualification." The complaint also alleges a demand upon defendant that he turn over to said Dawson the money, books, papers, vouchers and seal of said corporation. and a refusal of defendant so to do. It also alleges that the plaintiff corporation is unable to transact its business without the use of its said books, papers, etc.; that the defendant refuses to perform the duties of secretary and treasurer of said corporation, and refuses the officers of said corporation access to the books and papers thereof; that defendant threatens to leave the state of Washington; that he is insolvent, and admits having in his possession \$400 belonging to the plaintiff; and prays for a mandatory injunction requiring defendant to turn over to his successor in office, or to some proper officer of the corporation, the books, papers, vouchers, money, and the seal of said corporation, for judgment for \$884.74, the money alleged to belong to the corporation, and for \$500 damages. Before the issues were made up, a hearing upon plaintiff's application for a mandatory injunction was had upon affidavits filed by both plaintiff and defendant. At this hearing the court granted a temporary mandatory

injunction, requiring defendant to deliver to one James Lauzon, president of the said corporation, all the books, papers, and the seal, together with the sum of \$373.98, which defendant admitted he had in his possession, belonging to the plaintiff. From this order the defendant appeals.

It conclusively appears from the affidavits of both plaintiff and defendant filed upon the hearing for this order of injunction that the real purpose of the action is to determine whether the appellant or James Dawson is the lawful secretary and treasurer of the plaintiff corporation. The plaintiff claims that Mr. Dawson is the legally elected and qualified secretary and treasurer, and is entitled to the possession of the books, papers, moneys, and insignia of office as such; while defendant denies that his term of office has expired, denies that his successor has ever been legally elected, and also denies that he is threatening to leave the state, or that he is insolvent, or that he has refused to perform any of the duties of his office, or that he has refused the officers and stockholders free access to the books and papers of his office. He further states that no stockholders' meeting was ever legally called for the purpose of electing trustees or other officers to succeed himself and associates. The effect of the mandatory order of injunction appealed from was to dispossess the appellant of his office, and dispossess him of the property belonging thereto, upon the preliminary hearing. Certainly, where there is a *bona fide* claim of right to the possession of an office and the property belonging thereto, the court will not dispossess one in possession so claiming pending a determination of that question, especially where the one in possession and claiming the right to act as such officer is willing to and does perform all the duties of his office. In the case of *State ex rel. Byers v. Superior Court of Spokane County*,

Feb. 1903.]

Syllabus.

28 Wash. 403 (68 Pac. 865), which was a branch of this same case, we held that, under the provisions of the Code (Ballinger), § 5460, the court would have no authority to take the property of the corporation from the possession of one officer and deliver it to another, not authorized by the charter and by-laws to hold it. In the case of *Kimball v. Olmsted*, 20 Wash. 629 (56 Pac. 377), where an appointive city officer had been removed upon recommendation of the mayor, this court held that the remedy of the person claiming was by an information in the nature of quo warranto under § 5780, Bal. Code; and in *State ex rel. Mitchell v. Horan*, 22 Wash. 197 (60 Pac. 135), it was held that these provisions were applicable to private corporations. The title to an office cannot be tried in an action of replevin for personalty of the corporation. This being true, when it appeared to the court that the only object of the action was to determine the rights of two contending parties to the office of secretary and treasurer, the application for injunction should have been denied.

The cause is therefore reversed, and the order of injunction vacated.

FULLERTON, C. J., and DUNBAR and ANDERS, JJ., concur.

[No. 4459. Decided February 20, 1903.]

ANNIE VOWELL *et al.*, Respondents, v. ISSAQUAH COAL COMPANY, Appellant.

WITNESSES — CROSS-EXAMINATION.

In an action for the death of a coal miner, due to the fact that the timbers in the air-shaft caught fire from fires outside the mine, it was not error to allow a witness to be asked on

31	108
28	650

cross-examination, although not examined in chief on the point, as to whether, if a system of bells had been provided in the mine, deceased could have been notified of the fire in time to have saved his life, where the witness had testified in chief that he was superintendent of the mine and had been examined as an expert upon the proper handling of the mine.

TRIAL — MISCONDUCT OF ATTORNEY — INDULGENCE IN COLLATERAL REMARKS.

The fact that attorneys in the course of a heated trial indulged in collateral remarks, not pertinent to the issues, would not be ground for reversal, in the absence of a showing that the jury was unduly influenced thereby to the prejudice of the adverse party.

JURORS — MISCONDUCT — CONVERSATION WITH PARTY.

The refusal of the court to discharge a jury during trial because one of the jurors and one of the plaintiffs had indulged in a conversation together during an intermission was not error, where it appeared that the talk had by them was not upon the subject of the trial, was publicly had in the corridor of the court house before many people and in the presence of some of them, and there was no showing indicating intrigue between the juror and the party.

EXCESSIVE DAMAGES — DEATH BY WRONGFUL ACT.

A verdict of \$10,000 for the death of a coal miner through defendant's negligence was excessive, where the deceased was a man fifty-five years of age, with an expectancy of life of seventeen years, and an earning capacity of \$50 per month, which could not presumably be continued without intermission until he was seventy-two years of age, especially in view of the fact that his employment had never been constant prior to the time of his death.

Appeal from Superior Court, King County.—Hon. GEORGE MEADE EMORY, Judge. Affirmed.

Piles, Donworth & Howe, for appellant.

John B. Hart and *William Parmerlee*, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—This is an appeal from a judgment of the superior court of King county in favor of plaintiffs for

\$10,000 recovered in an action for damages for the death of C. H. Vowell, the husband of Annie Vowell, and the father of George and John Vowell. The deceased, at the time of his death, was a coal miner, working in the Issaquah coal mine, which was owned and operated by appellant. His death was caused by a fire in the mine. The contention of the respondents is that the timbers of the air shaft were ignited by a forest fire which had been burning for some days prior to the accident; that at the time in question, which was in the month of August, the forests were dry and combustible; that around the entrance of the air shaft timbermen had been at work during the previous May of 1900, shaping and sawing timber to be used in the mine; that these men left a great quantity of chips, shavings, and other debris lying around the air shaft at the entrance of the mine; that the entrance was not protected in any manner whatsoever; that the defendant had full knowledge of this condition of affairs, and no watchman was placed there, nor was anything done to protect the mine from fire in that regard; and that the fire had been burning near the air shaft for several days previous to August 21, the date of the death of Vowell. It was the contention of the appellant that certain persons constructing a county road set a fire in the forest, which fire escaped during the night, and the sparks herefrom fell into the air shaft, and set the timbers on fire. But certain it is that the mine took fire, and for the want of proper use of the fan the life of Vowell was lost. Only a meager portion of the testimony is brought here, and it is difficult to intelligently determine all the questions raised upon such state of facts.

The first assignment of error is that the court erred in allowing the witness Brooke to be interrogated on cross-examination as to whether, if a system of bells had

been provided in the mine, the deceased could have been notified of the fire, and his life have been saved; because there was no such issue under the pleadings, and because the witness Brooke had not been interrogated on his direct examination in regard to a system of bells. But we think the court did not commit error in this respect; that it was a question of caution on the part of the mine owners that could properly be examined into under the pleadings and under the direct examination of witness Brooke.

The second assignment embraces the alleged misconduct of counsel for respondents in making remarks which had a tendency to inflame the minds of the jurors against the appellant. We have examined the record with reference to this assignment, but are unable to conclude therefrom that any prejudicial error was committed. It was a heated controversy and many collateral remarks were made by the attorneys on both sides, which were probably not entirely pertinent to the issues, and it may be the case could have been tried more properly with less acrimonious discussion and fewer interjected remarks. But it is not given to all attorneys to try a law suit with equal grace and courtesy and consideration. Differences in temperament, education, and even disposition must be considered, and allowance made therefor. On the whole, we think the jury was not unduly influenced. if influenced at all, by the conduct complained of.

It is strenuously insisted that the court erred in not granting the motion of appellant for the discharge of the jury at a certain stage of the proceedings, because of alleged misconduct of one of the plaintiffs and one of the jurors in engaging in conversation during the recess of the court. The following statement was made during the trial by counsel for appellant:

“I want to move the court to discharge this jury from

further consideration of this cause for improper conduct on the part of one of the parties plaintiff and improper conduct on the part of one of the jurors, and I would like to call witnesses on that point."

The counsel proceeded to state, in substance, that he had seen Charles Johnson, one of the jurors, talk for a minute or a minute and a half with George Vowell, one of the respondents; that, after a seeming observation by him of the juror and said respondent, they separated, and that they were afterwards seen talking together again. It was upon this state of facts that the controversy arose. There did not seem to be any objection on the part of counsel for respondents to the investigation of the question. In fact, he demanded that the juror and the said respondent should be called upon the stand and questioned, and what was said ascertained. After a good deal of discussion between the court and the respective counsel, the court concluded that he was without authority to discharge the jury, and the motion was denied, and the cause proceeded. A large number of cases have been cited by the appellant in support of the contention that the court erred in denying the motion to discharge the jury, many of which are from this court. But without especially reviewing them, we think none of them are in point, or go so far as to hold that a casual remark or conversation between a juror and a litigant, before the jury has retired to consider of its verdict, would warrant a discharge of the jury. This conversation occurred in the public corridor at the court house where jurors, witnesses, litigants, and spectators were mingling indiscriminately, and, while it is absolutely necessary that juries should be kept beyond the influence of interested parties, or even above the reasonable suspicion of undue influence, it does not seem to us that, considering the circumstances of the case, the

publicity of the meeting, the fact that it is customary for country people to greet each other when they meet in public places, the want of any circumstance showing intrigue on the part of the juror and the respondent, or any attempt to escape observation, the policy of the law would warrant a discharge of the jury, or that the presumption of an attempt to use undue influence would obtain. It is insisted by counsel for appellant—and it is no doubt true—that, where an attempt has been made to unduly influence a juror, the presumption would be that such attempt was successful. But such was not the case here. In addition to this, upon motion for a new trial, affidavits were filed by the juror Johnson, who is charged with misconduct, by respondent George Vowell, and by a witness to the conversation. The juror, in his affidavit, testifies that he knew that it was not proper, right, or lawful for him to discuss the subject of the law suit with anybody, and that he had not done so in any particular; that the conversation to which counsel had referred was upon an entirely different subject; that he had simply been discussing with young Vowell a marriage of some mutual acquaintance at Falls City, and that nothing else was talked about. The affidavits of Vowell and the witness who overheard the conversation were of similar import. So that, under all the circumstances, it seems to us that it would be inconsistent with reason to sustain the contention that error had been committed in this respect.

We do not think that it is necessary to go into a discussion of the other errors alleged in appellant's brief. The questions presented have all been discussed by this court so often that a reannouncement of the law governing them would be the purest repetition. The court certifies that plaintiffs produced evidence tending to prove that the air

shaft of defendant's mine opened into a forest; that the defendant had knowingly and negligently permitted large quantities of chips and forest debris to accumulate around the mouth of the air shaft; that it was the summer season, and that the chips and debris had become very inflammable; that this condition had been known to the defendant; that forest fires had been of frequent occurrence in the vicinity in former years; that forest fires surrounding the shaft had existed several days preceding this fire in the mine which resulted in Vowell's death, and that the day preceding the fire in the mine there was fire between the air shaft and the company's mine, and the company's officers knew that fact; that there was no watchman stationed at the mouth of the air shaft, or in that vicinity; that the air shaft was the sole means of ventilating the mine, which was effected by a powerful fan at the other entrance of the mine upon the opposite side of the mountain; that the fan, in its usual operation, sucked or drew the air into the mine through the air shaft, causing a strong current of air to flow into the mine, the entrance to which at the air shaft was strengthened by large timbers and lagging; that just prior to decedent's death he, with others, was engaged in mining coal inside the mine; that, as a result of the foregoing alleged facts, the fires burning in the forests were communicated to the timbers in the mouth of the shaft, and were drawn by the air current some two hundred feet into the mine, creating dense volumes of smoke, which passed into the mine workings, and resulted in decedent's death; that, had the fan been reversed, the current of air would have carried out the smoke, and averted the death of decedent, and that due care required such a course.

This being true, and the testimony on the subject em-

braced in the certificate not being before the court, and no error having been committed by the court in giving or refusing instructions, so far as can be determined by this court upon the record as presented, there is but one subject left for the investigation of the court, and that is the question of the excessiveness of the verdict, it being contended by the appellant that the verdict was excessive, and plainly the result of prejudice or passion. The decedent, at the time of his death, was a man fifty-five years old, and was receiving for his services \$50 per month. His expectancy of life was proven to be seventeen years. The verdict was, therefore, within \$200 of the amount which he would have received at the rate of wages which he was earning at the time of his death, if he had lived during the time of his expectancy, and received full wages during all that time. We think, under the circumstances, that this was an unreasonable conclusion reached by the jury. The jury acted upon the theory that the expectancy proven was a reality. It is a fact, lamentable as it may be, that the earning capacity of men decreases after middle life, and usually decreases very rapidly. This man had already lost one eye. He was at the time of life when his physical vigor was on the wane. No other means of obtaining a livelihood or making money was attributed to him than as a worker in a coal mine. The verdict of the jury makes no allowance, not only for a decrease in his wage earning capacity, but for accident, illness, or break in time employed, whether voluntary or involuntary. We do not think that the jury could reasonably have concluded that the decedent would, without intermission, have continued to earn the sum of \$50 a month until he was seventy-two years old, to say nothing of the expenses necessary to his own subsistence during that time. It would be a matter of simple impossibility that this amount

of money, even if he had lived during the term of his expectancy, could have been received by his estate, and the testimony of his wife shows that his employment theretofore had not been constant. While this court dislikes to interfere with the prerogative of the jury in passing upon questions of fact, when a verdict rendered shows conclusively that the judgment could not have been based upon the testimony produced it becomes its duty to interfere. We think, under all the testimony as shown in this case, including that in relation to the earning power of the deceased as presented in the record, a verdict of \$6,000 would have been as great a one as could be sustained.

Instead, however, of reversing the cause and entailing upon these respondents the expense of a new trial, the judgment of the court will be that, if the respondents within twenty days from the filing of this opinion remit from the judgment obtained the amount of \$4,000, the judgment, as so amended, will be affirmed; otherwise the judgment will be reversed and a new trial granted.

FULLERTON, C. J., and MOUNT, HADLEY and ANDERS, JJ., concur.

[No. 4560. Decided February 20, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES G. RABY, *Appellant*.

EMBEZZLEMENT — SUFFICIENCY OF INFORMATION — ALLEGATION OF AGENCY.

Under Bal. Code, § 7119, which provides that, if any agent clerk, officer, servant, or person to whom any money or other property shall be intrusted, with or without hire, shall fraudulently convert the same to his own use, he shall be guilty of larceny, an information sufficiently charges the crime of larceny

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by embezzlement, where it charges that defendant, as county auditor, received a county warrant, the property of another which was intrusted to him by virtue of his office, and which he afterwards fraudulently and feloniously converted to his own use.

SAME — SUBJECT OF LARCENY — UNDELIVERED COUNTY WARRANT.

A warrant drawn by a county auditor and placed upon the files of the office, pursuant to the order of the commissioners upon an approved claim against the county, is a thing of value although never having been delivered to the proper owner.

Appeal from Superior Court, Whitman County.—Hon. STEPHEN J. CHADWICK, Judge. Affirmed.

Thomas Neill, for appellant.

R. J. Neergaard, Prosecuting Attorney, for the State.

The opinion of the court was delivered by

DUNBAR, J.—The information upon which the verdict in this case was rendered is as follows:

“Comes now R. J. Neergaard, prosecuting and county attorney for the county of Whitman, state of Washington, the superior court being in session and the grand jury of said county not being in session, and by this, his information, accuses Charles G. Raby of the crime of larceny committed as follows, to-wit: That the said Charles G. Raby in the county of Whitman, in the state of Washington, on the 29th day of November, 1901, was then and there duly elected, qualified and acting county auditor of said Whitman county, state of Washington, and had been said county officer from and after the 7th day of January, 1901; that on the 18th day of October, 1901, in said county and state, he, the said Charles G. Raby, by virtue of his said position and office of county auditor, as aforesaid, did receive and take into his possession and have intrusted to him a certain county warrant for the sum and of the value of seventeen hundred and fifty-three dollars, which said county warrant was issued by order of the board of county commissioners of said Whitman county

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by the said Charles G. Raby, county auditor, as aforesaid, on the said 18th day of October, 1901, wherein and whereby the treasurer of said Whitman county was directed to pay to the American Bridge Company, or order, the sum of \$1,753, out of the road and bridge fund of said Whitman county, Washington, which said county warrant so intrusted to him, the said Charles G. Raby as county auditor aforesaid, is in substance and effect and in the words and figures following, to-wit:

"No. 2049. Colfax, Washington, Oct. 18, 1901.

"To the Treasurer of Whitman County, Washington:

"You are directed to pay to American Bridge Co., or order, seventeen hundred and fifty-three and No-100 dollars, (\$1,753.00) out of the Road and Bridge Fund of Whitman county, Washington, for balance contract price on Palouse Bridge. If not paid when presented for payment this warrant shall bear interest thereafter at the rate of seven per cent per annum until called.

"Issued by order of the Board of County Commissioners.

"C. G. Raby,

(SEAL.)

"County Auditor.

"By F. O. Williams, Deputy.'

"Indorsed on face:

"654.

"38753 Vouchers Treasurer's Report Jan. 6, 1902.

"Paid Nov. 29, 1901, Whitman County,

"W. J. Windus, Treasurer.'

"Cut in warrant with perforating stamp:

"\$1753.'

"Indorsed on back:

"American Bridge Co. American Bridge Co.' By
C. G. Raby, County Auditor.'

"For check:

"Check No. 9075 to C. G. Raby, Auditor.'

The same then and there being the property of the said American Bridge Company, a foreign corporation, then and there duly authorized to transact business in this state; and afterward, to-wit, on the 29th day of November, 1901, in the said Whitman county, state of Washing-

ton, the said Charles G. Raby did then and there, fraudulently and feloniously convert the said county warrant to his own use, and so did then and there in manner and form aforesaid, the county warrant, the property of the said American Bridge Company, from the said American Bridge Company feloniously steal, take and carry away; contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Washington."

A demurrer was interposed to the information, which was overruled, the case proceeded to trial; the jury returned a verdict of "Guilty as charged," and the defendant was sentenced to eight years in the penitentiary. From this judgment and sentence appeal was taken.

It is assigned that the court erred in overruling defendant's demurrer to the information, for the reason that the essential element of the crime of embezzlement is the existence of a trust or some fiduciary relationship or confidence reposed; that the statute requires such relationship to be that of principal and agent, corporation and officer, master and servant, beneficiary and trustee, or bailor and bailee, and that hence, unless the defendant was the agent, clerk, officer, or servant of the American Bridge Company, or was intrusted by the American Bridge Company with the warrant described in the information, there can be no conviction; and that the information does not allege any of these facts. This argument is not available to the appellant since the decision by this court of *State v. Isensee*, 12 Wash. 254 (40 Pac. 985), and *State v. Downing*, 15 Wash. 413 (46 Pac. 646). But, as an independent proposition, § 7119, Bal. Code, provides that:

"If any agent, clerk, officer, servant, or person to whom any money or other property shall be intrusted, with or without hire, shall fraudulently convert to his own use,

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or shall take and secrete the same with intent fraudulently to convert the same to his own use, or shall fail to account to the person so intrusting it to him, he shall be deemed guilty of larceny, and on conviction thereof shall be imprisoned," etc.

If the legislature had a right to enact such a law—and such right is not, and, we think, cannot be questioned—it would seem that there is no room for controversy. The language of the law is plain, simple, and comprehensive, and the statement of facts furnished by the information is equally plain, and within the provisions of the law. By this information the defendant is informed that at the time of the alleged offense he was an officer to whom property was intrusted, and the property was plainly described. He is informed that he fraudulently and feloniously converted said property to his own use. If these allegations of the information are true, the statutory crime has been committed, and no amount of discussion can make the proposition plainer. By virtue of his office, defendant became the legal custodian and bailee of the warrant by operation of law. He therefore had the warrant rightfully in his custody, and also, by operation of law, held it as the agent of the owner. When he assumed the duties of the office, he assumed to act as agent for the owner, under provisions of the law, and he is estopped from denying such agency. If he is agent to receive the money for the owner, he is agent to deliver it to him. It would certainly be a puerile law that would constitute a public officer an agent to receive money for one with whom the municipality is dealing, and allow him to deny the agency for the purpose of escaping punishment for embezzling such property. The objection that there was no value to the warrant until it was delivered, and that the ownership was not properly alleged, is equally untenable. The

warrant was duly authorized, legally drawn and issued by the proper officer for an approved claim against the county, by order of the proper authorities. Its proper place was in the auditor's files, and, when it was removed from those files by the officer and cashed, it was so removed and cashed because it was of value, notwithstanding the fact that it had not yet been delivered to the proper owners. On this proposition see *State v. White*, 66 Wis. 343 (28 N. W. 202).

There was no error committed by the court in the admission of testimony or in instructions given or refused. The defense was a purely technical one, which cannot obtain under the provisions of our Code, and under the uniform rulings of this court.

The judgment is affirmed.

ANDERS, MOUNT and HADLEY, JJ., concur.

FULLERTON, C. J., not sitting.

[No. 4533. Decided February 21, 1903.]

C. W. NELSON *et al.*, Respondents, v. NELSON BENNETT COMPANY, Appellant.

BILLS OF EXCHANGE — WAIVER OF NECESSITY FOR WRITTEN ACCEPTANCE — FAILURE OF PROOF.

In an action by plaintiffs upon an unaccepted order for the payment of money, which, under Laws 1899, p. 362, § 126 *et seq.*, would not bind the drawee unless accepted in writing, it was error to refuse a directed verdict in defendant's favor, where the allegations of the complaint as to an agreement obviating the necessity for a written acceptance were wholly unsupported by evidence.

COSTS — JURY FEE IN CIVIL CASES — REPEAL OF STATUTE.

The act of 1857 providing that a jury fee of \$12 shall be taxed as costs in civil actions was impliedly repealed by the

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general act on the subject of fees and costs, found in Laws 1893, p. 421, which enumerates the fees to be collected by clerks of superior courts, expressly stating that certain fees shall be collected in causes tried by a jury, but nowhere specifying a jury fee among them.

Appeal from Superior Court, Chehalis County.—Hon. MASON IRWIN, Judge. Reversed.

F. L. Morgan, for appellant.

J. C. Cross, for respondents.

W. B. Stratton, Attorney General, as *amicus curiae*.

The opinion of the court was delivered by

HADLEY, J.—This action was instituted by the respondents as a copartnership, against the appellant, a corporation. The amended complaint alleges that a certain copartnership, known as Mounce & Blue, for value received, made and delivered to the respondents a certain writing, of which the following is a copy:

“Aberdeen, Wash., October 3rd, 1901.

“For value received we hereby sell and assign to Nelson and Brecht five hundred and fifty-two 59-100 dollars of any money due or to become due us from Nelson Bennett Co. on account of our contract with them in the construction of railroad work. And we hereby request the said Nelson Bennett Co. to pay to Nelson and Brecht the said sum of \$552.59 dollars out of any money due or to become due us on account aforesaid and to charge same to our account.”

It is further alleged that said writing was by respondents presented to appellant, and payment thereon demanded, but that appellant refused to pay the same or any part thereof; that at the time of the execution of said writing, and at the time of making the demand aforesaid, the appellant was indebted to said Mounce & Blue

in a sum sufficient to pay and discharge the amount specified in said writing; that appellant was indebted to said Mounce & Blue on account of work and labor performed for, and material furnished to, appellant by said Mounce & Blue, under an agreement therefor between appellant and said firm, whereby the proceeds arising from said work, labor, and material should be paid by appellant to said firm, or their order, in such sum or sums and to such person or persons as to said firm might seem right and proper, the appellant to charge the amount of such orders to said firm and against any moneys due them under their contract aforesaid. Judgment is demanded against appellant for the amount stated in said writing. Other causes of action were also stated in the amended complaint, but at the trial the court granted a nonsuit as to all causes of action except the first, and in this appeal only matters connected with the first cause of action are to be reviewed. A demurrer to the amended complaint as above set forth was overruled. Issue was joined, and a trial was had before a jury, resulting in a verdict in favor of respondents for the sum of \$552.59. Judgment was entered upon the verdict of the jury, and from said judgment this appeal is taken.

It is assigned that the court overruled the demurrer to the amended complaint, and also that the court erred in refusing to instruct the jury to return a verdict for the defendant. It is urged by appellant that the writing set forth in the complaint as the basis of the action is an order or bill of exchange within the meaning of the act relating to negotiable instruments, as described in § 126, at page 362, of the session laws of Washington for 1899, and that no liability of appellant could arise thereon unless the same had been accepted by appellant as provided by § 127 of the same act. Section 132 of the said act of 1899

(Laws 1899, p. 363) provides that the acceptance of a bill of exchange must be made in writing whereby the drawee assents to the order of the drawer. The complaint does not allege an acceptance in writing, and, unless its allegations are sufficiently broad to charge appellant with liability upon some theory other than that of a strict bill of exchange under our statute, it is insufficient against demurrer. It is alleged, however, that there was an agreement between the drawers of this paper and the appellant by which the drawers were to do certain work for appellant, and the appellant was to pay them or their order in such sums as they might direct within any amount due them. It is not alleged whether the agreement was oral or written, but it is averred that the terms with reference to the payment on orders were a part of the agreement under which the work was done. Because of the averments last mentioned, the complaint may state facts with reference to an agreed course of dealing which are sufficient to charge appellant as against demurrer. The question presented by the demurrer is, however, a close one. In view of what we shall hereinafter say, we may assume for the present, but we do not actually decide, that the complaint states a cause of action.

It will be remembered, as above stated, that the pleader skillfully avoided any description of the contract mentioned in the complaint by which it could be determined from the face of the complaint whether the contract was oral or written, but it was alleged that, as a part of the contract for doing the work, appellant agreed to make payments upon the orders of Mounce & Blue. However, after the evidence was introduced at the trial, and at the time the request was made for an instruction that the jury should return a verdict for appellant, it had appeared that the contract between appellant and Mounce & Blue

was in writing. Nothing is said in the written contract about payment by appellant upon orders. The contract provides only for direct payment to Mounce & Blue at prices therein specified. There was evidence introduced, over appellant's objection, to the effect that some subsequent verbal understanding may have been had upon the subject of payment upon orders, but that evidence, we think, was improperly admitted, and cannot be held to support the allegation of the complaint that it was all a part of one agreement, when it appeared that the agreement was in writing and that the writing contained no such provisions. Granting, therefore, that the complaint states a cause of action, its allegations were not sustained by the proof in the particular mentioned, and recovery cannot be had upon the theory that there was a general agreement by appellant to accept and pay orders issued by Mounce & Blue. If the written instrument described in the complaint is an order only, then it comes within the provisions of our statute relating to negotiable instruments, and recovery cannot be had in this action, for the reason that it was never accepted in writing by appellant as required by the statute. Respondents' counsel seems to concede that the instrument is an order, and we think it must be so regarded. The fact that the word "assign" is used does not change the character of the instrument from an order to an ordinary assignment. Every bill of exchange may be said to be an assignment *pro tanto* of a designated fund. We therefore think the court erred in its refusal to instruct the jury to return a verdict for the defendant.

It is assigned as error that a jury fee of \$12 was taxed against appellant as part of the costs. Appellant's counsel leaves this matter with the simple statement that such costs are unauthorized in law, and does not even cite the law

under which the lower court holds that such costs should be paid. Respondents' counsel, however, is kind enough to refer us to the statute upon which the superior court bases its ruling, and the attorney general has kindly filed a brief upon this subject as *amicus curiae* of the trial court and also of this court, since the question presented is one of general public interest. We are referred to an act entitled, "An act to establish the amount, and provide for the payment of costs in certain cases," approved January 28, 1857. Section 7 (Laws 1857, p. 20) of that act provides that in civil actions the party in whose favor a verdict shall be returned shall, before the same is recorded, pay to the clerk the sum of \$12, which may be taxed against the opposite party as part of the costs. We believe, however, that this statute has been repealed. There have since been passed several general acts regulating fees and costs, but without discussing them severally, we refer to the general act of 1893 upon this subject, found in the Session Laws of 1893, at page 421 *et seq.* That act names the fees that shall be collected by clerks of the superior courts. No so-called jury fee is specified in the act, but specific fees to be collected are enumerated, and in subdivisions 3 and 4 of § 2 of the act it is specifically stated that certain fees shall be collected by the clerk in causes tried by a jury. The act contains a general repealing clause. It purports to be a general act upon the subject of fees and costs. It is the latest expression of the legislative will upon the subject. And we think the provisions above mentioned for fees to be collected in jury causes were intended by the legislature to supersede all former laws upon the subject. We believe its provisions must be held, at least impliedly, to repeal the former law. We therefore think it was error to tax the jury fee of \$12.

For the reasons stated, the judgment is reversed, and the

cause remanded with instructions to the lower court to enter judgment dismissing the action.

FULLERTON, C. J., and MOUNT, DUNBAR and ANDERS, JJ., concur.

[No. 4477. Decided February 24, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. J. E. CRONEY, *Appellant*.

CRIMINAL LAW — PROSECUTION BY INFORMATION.

Bal. Code, § 6813, which provides that "the grand jury shall inquire into the cases of parties in custody or under bail, charged with commission of offenses against the laws of this state, and duly returned by a committing magistrate, or upon a complaint sworn to before an officer authorized to administer oaths and presented by the prosecuting attorney, or under the instructions of the court," is inapplicable in cases where one is in custody under an information filed by the prosecuting attorney.

SAME — JURY — INCOMPLETE PANEL — RIGHTS OF ACCUSED.

The statutory provision respecting the number of jurors necessary to be provided for in the venire to fill incomplete panels is one in the interest of the state, and does not give the accused a vested right in the number to be summoned.

SAME — QUALIFICATIONS OF JUROR — PREJUDICE.

In the examination of a juror it is not proper to ask him if he has a prejudice against a man who stands charged with a crime (FULLERTON, C. J., dissents).

SAME — GROUND OF CHALLENGE — BIAS.

Where a juror says that he has a feeling against crime and to some extent an opinion against one charged therewith, but would try the case upon the evidence and under the instructions of the court, regardless of any other consideration, he cannot be challenged on the ground of bias.

SAME.

The fact that a juror testified on his examination that he could not give the defense of insanity caused by the excessive use of intoxicating liquors the same weight as any other defense

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would not be ground of challenge, where his later examination showed that, when he understood from the court that insanity from intoxication was a defense under the law, he was willing to recognize such defense and give the defendant the benefit of the evidence thereon.

SAME — IMPRESSION FORMED FROM NEWSPAPER ACCOUNTS.

The impression formed as to defendant's guilt from reading a newspaper account of a crime, although requiring evidence to remove, is not such an opinion as would disqualify a juror from passing upon the guilt or innocence of the defendant, when he further testifies that such impression or opinion would not influence him in arriving at a just verdict based upon the testimony at the trial and the instructions of the court.

SAME — FEELING AGAINST INSANITY AS A DEFENSE.

Although a juror has testified that he could not impartially and fairly try a case where the defense was insanity caused by the excessive use of intoxicating liquors, yet he is not subject to challenge, where, after explanation by the court that insanity, from whatever cause, is a good and valid defense to every charge of crime, he answers that he could give the defendant the benefit of every reasonable doubt upon the question of insanity.

SAME.

Where a juror answered that he could not give insanity caused by the excessive use of liquors the same weight as any other legal defense, but, after the distinction between drunkenness and insanity caused by drunkenness had been explained to him, answered that he would undoubtedly give the defendant the benefit of such defense, he was not subject to challenge on the ground of bias.

Appeal from Superior Court, Stevens County.—Hon. FRANK H. RUDKIN, Judge. Affirmed.

C. A. Mantz and J. A. Kellogg, for appellant.

J. E. M. Bailey, Prosecuting Attorney, and *P. F. Quinn*, for the State.

The opinion of the court was delivered by

DUNBAR, J.—The appellant was charged, upon information of the prosecuting attorney, with the crime of murder

in the first degree for the killing of one Jerry Lyons, on the 12th day of February, 1902. The killing was admitted, and as a defense the appellant claimed that, at the time of the killing, he was insane from the excessive and long-continued use of intoxicating liquors, and by inheritance from his father, who had been addicted to the excessive use of intoxicating liquors, and who had been insane before the birth of the defendant; also that the killing was done by defendant in self-defense, it appearing to him at the time of the killing that it was necessary to take the life of deceased in order to protect his own. The jury found the defendant guilty of murder in the second degree, and the court thereupon pronounced sentence of seventeen years in the penitentiary.

It is assigned, first, that the court erred in its refusal to grant defendant's motion to quash the information and discharge the defendant, for the reason that at the time a grand jury was in session the defendant was confined in the county jail, and that the grand jury made no investigation concerning the alleged crime with which the defendant was charged, or at all; and that the grand jury did not return a true bill against the defendant, charging him with the crime of murder in the first degree, or with any crime. We think the appellant misinterprets § 6813, Bal. Code, which provides that "the grand jury shall inquire into the cases of parties in custody or under bail, charged with commission of offenses against the laws of this state, and duly returned by a committing magistrate, or upon a complaint sworn to before an officer authorized to administer oaths and presented by the prosecuting attorney, or under the instructions of the court." This case does not fall within the provisions of such section. Our statute provides that a prosecution may be either by information

or indictment, and the provision referred to above does not apply to a case where an information has been filed.

The second assignment—that the court erred in its refusal to grant defendant's motion to quash and set aside the panel of petit jurors—is equally without merit. The defendant had no vested right in the number of jurors provided for in the venire to fill incomplete panels. The provision in relation to the number is an economic provision in the interest of the state, with which the defendant is not concerned. Nor are we inclined to sustain the third assignment—that the court erred in refusing to grant defendant's motion for a continuance on the ground of the absence of material evidence on the part of the defendant. This is a matter which was submitted to the discretion of the court, and an investigation of the record does not convince us that such discretion was abused.

It is stoutly maintained that the court erred in its refusal to sustain defendant's challenges for cause to numerous jurors to whom defendant excepted. The first of these was the juror Nettleton. The first pertinent answers in the examination were as follows:

“Q. Mr. Nettleton, have you any feeling or prejudice against a man who stands charged with a crime? A. Yes, sir. Q. You have? A. Yes, sir. Q. Is that opinion or prejudice such as would preclude you from, or would hinder you in any way from, bringing in a verdict according to the law and evidence? A. No, sir. Q. Is that opinion a fixed opinion against a person charged with an offense? A. To a certain extent. Q. Then you could not, Mr. Nettleton—could not, if you were chosen as a juror—go into the case unbiased in every way? A. I think I could. Q. But still you do have a prejudice against a person who stands charged with an offense? A. Yes, sir. Q. Even before he is proven guilty? A. Yes, sir. Q. And you

would go into the trial of this case, if chosen as a juror, with that prejudice against the defendant, would you? A. I think I would. Q. Then you could go into the trial of this case presuming the defendant innocent of any crime? A. Yes, sir; I could. Q. You would? A. Yes. Q. Then that prejudice which you have spoken of against the defendant would not in any way affect your feeling towards him in the trial of this case, if you were chosen? A. Not to any extent. Q. But it would to some extent? A. Yes. The Court: Will you try this case upon the evidence wholly, and under the instructions of the court, regardless of any other consideration? A. Yes, sir."

Whereupon the challenge was denied. We do not think that the answers elicited from the juror show that he was disqualified to act as a juror in the case. In the first place, it is not proper to ask a juror if he has a feeling or prejudice against a man who stands charged with a crime. No man, if he understands such a question, will answer that he has a prejudice, because a prejudice is something that is not founded on information or reason. It was plainly not the intention of the juror to proclaim himself such a man. He evidently meant to say that he had a feeling against crime, and, when he said that he would try the case upon the evidence wholly, and under the instructions of the court, regardless of any other consideration, if he is to be believed, he would be a fair juror. A further examination of this juror was as follows:

"Q. Mr. Nettleton, have you any feeling or prejudice against a defense, interposed to the charge of murder, of insanity? A. I think not. Q. Well, do you know you have not? A. Yes. Q. If the defense should be insanity caused by the excessive use of intoxicating liquors, could you give that evidence the same weight as any other defense known to the law? A. I could not. Q. You could

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not? A. No, sir. Q. And you would not? A. No, sir."

(Another challenge was interposed for cause.)

"The Court: If the court should instruct you that the defense of insanity, whatever might be the cause of that insanity, was a defense to this crime, would you consider that—would you give the defendant the benefit of it? A. I would. Q. The mere fact that his insanity was caused by the excessive use of intoxicating liquors would not prejudice you against him, providing the insanity was shown—would you consider it the same as any other defense interposed upon the trial, and give the defendant the benefit of it, provided it was shown by the testimony. A. I would."

It is evident that the witness did not understand the difference between insanity and intoxication, and that, when he understood from the court that insanity from intoxication was a defense under the law to a charge of crime, he was willing to recognize the defense and abide by the law.

The juror Ogden testified that he had read an account of the killing in a newspaper; that he formed an opinion from such reading; and that it would take evidence to remove that opinion; and, when asked the direct question if it would take evidence to remove such opinion, replied that it would. But to the next question: "Then you could not go into this jury box, sworn as a juror, with your mind perfectly free, neither in favor of one side or the other, if you were chosen as a juror?" the answer was: "Yes, sir; I think I could." Q. "You could go into the jury box with your mind perfectly free from bias?" A. "Yes, sir." Q. "Then the opinion you have would not in any manner influence you in arriving at a just verdict in this case?" A. "I don't think it would." The whole testimony of the juror shows that he did not intend

to state that he had any fixed opinion in regard to what he had read of the matter, but that it was simply an impression from such reading, without any knowledge of whether what he had read was the fact or not. The amount of credit given to newspaper accounts differs very largely with the individuals who read them, and yet it can scarcely be denied that some impression is made on the mind of every reader who gives time enough to an article to read it at all. But such an impression as this is not such an opinion as would disqualify a juror from passing upon the guilt or innocence of a defendant based upon the testimony adduced at the trial, under proper instructions by the court.

The juror Lynch gave the following answers to questions touching his qualifications:

“Q. Now, Mr. Lynch, feeling as you do with reference to the defense of insanity, if you stood charged with this offense here, and your defense should be insanity caused by the use of intoxicating liquors, would you feel satisfied with a man sitting upon your jury entertaining the same ideas which you now entertain? A. No, sir. Q. Do you feel as though you could fairly and impartially try this case, so far as the defendant is concerned, if that should be the defense? A. No, I do not think so. Q. You feel as though you would try and do your duty under the instructions of the court, but your opinions would influence you for all that in the matter? A. I believe they would. Q. Then you do not feel that you could give that defense the same weight as you would give the defense of self-defense under the instructions of the court? A. No, sir.”

Then the challenge was interposed, and the following query made by the court:

“Q. Mr. Lynch, insanity is a good and valid defense to every charge of crime, and if, after hearing all the testimony in this case, it appeared to you that the defen-

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dant was insane, or you had a reasonable doubt as to his being insane, regardless of the cause of that insanity, would you give him the benefit of that doubt under the instructions of the court? A. Why, certainly. Q. Would you treat it to that extent under the instructions of the court just the same as any other defense? A. Certainly. Q. Have you any doubt as to your ability to do that? A. No, sir; I have not the least bit of doubt. Q. You have no doubt but what you can give the defendant the benefit of every reasonable doubt upon the question of insanity, or any other question in this case? A. Yes, sir. Q. And will you do so? A. Yes, sir."

Before the test of incompetency can be applied to a question propounded to a juror, it must appear that the juror answers with understanding. A simple-minded, though ordinarily intelligent, juror may be led to make many remarks which seem to disqualify him, and would disqualify him if he understood the full scope of the questions. But it is evident from the testimony of the juror in this case that he was answering the questions in regard to the defense of insanity before he had been made aware that insanity under the law was a good defense to every charge of crime. And it appears evident that, when he answered enlightened by such information, the answer to the previous question was explained, and the witness at least thought that he was qualified to do justice to the defendant. While we have said in *State v. Murphy*, 9 Wash. 204 (37 Pac. 420), and *State v. Wilcox*, 11 Wash. 215 (39 Pac. 368), that a juror who has expressed himself as entertaining a certain view on a question cannot be heard to say that he can lay aside that view and render justice to a defendant for the simple reason that he is not able to tell whether or not he can disabuse his mind, yet the questions propounded and answered in those cases

were answered with a full understanding of the subject discussed.

What has been said with reference to the jurors before mentioned will apply to the juror Townsend, with whom the following colloquy occurred:

“Q. Have you any feeling or opinion or prejudice in favor or against a defense if it should be insanity on a charge of this kind? A. I don’t think I have. Q. If it should appear that insanity had been caused by the excessive use of intoxicating liquors, could you give that defense the same weight, under the instructions of the court, as any other legal defense? A. Don’t think I could. Q. Even if the court should instruct you— A. Do I understand you if it was caused by liquor? Q. Yes, sir. A. I don’t think I could.”

(Challenge interposed.)

“The Court: You understand there is a distinction between drunkenness and insanity caused by the use of intoxicating liquors? A. Yes, sir. Q. And if it should appear that this defendant was insane from any cause, or you entertained a reasonable doubt of his insanity from any cause, you would give him the benefit of that doubt and find him not guilty? A. I think I should; certainly. Q. That is, insanity as distinguished from drunkenness? A. Yes, sir.”

It is evident the first questions propounded the witness were answered without an understanding of the difference between drunkenness and insanity, and he simply meant to express the ordinary thought that drunkenness is no excuse for crime. But when he finally understood—as he should have understood before he was called upon to answer any questions at all on the subject—the distinction between drunkenness and insanity caused by drunkenness, the juror unhesitatingly asserted that he would give the defendant the benefit of such defense; making a seeming contradiction of his prior testimony, when there was no

Feb. 1903.] Dissenting Opinion.—FULLERTON, C. J.

contradiction in fact.

We think, after reading the entire examination of all of these jurors, that, under the rule announced by this court in *State v. Farris*, 26 Wash. 205 (66 Pac. 412), they were not disqualified.

We do not think there was any reversible error in the instruction of the court as to reasonable doubt, or in the refusal of the court to give instructions asked, as the law on the subject had been correctly given. Nor was there any error in the alleged irregularities concerning the bailiff, or in any other particular.

The judgment is affirmed.

MOUNT and HADLEY, JJ., concur.

FULLERTON, C. J. (dissenting)—I cannot agree with the majority that the jurors Ogden, Thompson, and Lynch were qualified. The two first named were, I think, disqualified under the rule in *State v. Murphy*, 9 Wash. 204 (37 Pac. 420), and *State v. Wilcox*, 11 Wash. 215 (39 Pac. 368), and that juror Lynch was disqualified because prejudiced against one of the defenses interposed. True, the latter said, in answer to questions put to him by the judge, that he could give the defendant the benefit of the defense of insanity caused by drunkenness, or the benefit of a reasonable doubt on the question; yet it is well known that one having a prejudice against a particular defense is much harder to convince of its existence than is one whose mind is free to act. Neither can I agree that it is improper to ask a person called as a juror whether or not he has a prejudice against a man who stands charged with crime. Such a prejudice does exist, and, when strong enough to affect the juror's decision, is a disqualification. By the Code a proposed juror is made a competent witness as to his own qualifications, and I see no reason why

he may not be examined on any subject that affects his qualifications. But if it were not a question going to the competency of the juror, I still think it permissible. In this state a certain number of challenges are allowed each party, which can be exercised without assigning a reason therefor. If this right is to remain of value, then the parties must have the privilege of examining jurors somewhat more widely than the statutory right to challenge for cause will warrant. As preliminary to this right of peremptory challenge, I think such questions as this are not only permissible, but proper. In my opinion, the judgment should be reversed, and a new trial granted.

[No. 4552. Decided February 24, 1903.]

THE STATE OF WASHINGTON *on the Relation of B. F.
Heuston v. C. W. MAYNARD, as State Treasurer.*

SCHOOL LANDS — PROCEEDS OF SALE — STATUTE AUTHORIZING INVASION OF PRINCIPAL — CONFLICT WITH ENABLING ACT.

The act of March 7, 1895 (Laws 1895, p. 55) providing for the creation of a state normal school fund into which shall be paid all proceeds from the sales of lands granted to the state of Washington by the United States for normal schools, and authorizing the payment of the cost of erection of normal school buildings from such fund is void, because in conflict with the provisions of the enabling act for the admission of this state into the Union, wherein it is provided (§ 11) "that all lands herein granted for educational purposes shall be disposed of only at public sale, . . . the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools."

Original Application for Mandamus.

B. F. Heuston, for relator.

W. B. Stratton, Attorney General, for respondent.

Feb. 1903.] Opinion of the Court.—MOUNT, J.

The opinion of the court was delivered by

MOUNT, J.—This is an original application for a writ of mandate to compel the state treasurer to pay the interest upon a warrant issued by the state through its proper officers upon the state normal school fund, in consideration of work done and expenses incurred in the erection of a state normal school building for the Washington State Normal School at New Whatcom. The warrant was drawn pursuant to an act of the legislature, approved March 7, 1895. Laws 1895, p. 55. The fund upon which it was drawn was created by the first section of the act, which is as follows:

“Section 1. There is hereby created a fund to be known as the ‘state normal school fund,’ into which fund shall be paid all proceeds from the sales of lands granted to the state of Washington by the United States for state normal schools, and that no appropriation for the erection of state normal school buildings shall be made from any other fund, except the fund derived from the sale of lands granted by the United States to the state of Washington for state normal schools.”

Sections 2 and 3 of the act appropriate from said funds for the purpose of erecting and equipping a state normal school at Cheney, \$60,000, and for another at Whatcom, \$40,000. Section 4 authorizes the issuance of bonds to the amount of \$100,000, “payable out of the fund provided for in section one of this act, and not otherwise, and no primary or secondary application for the payment of said bonds, except out of the aforesaid fund, is intended to be created by this act. Said bonds shall not be sold for less than par.” The state was never able to sell these bonds, and none were ever issued. Section 5 of the act is as follows:

“Sec. 5. Until the sale of said bonds, the work of erect-

ing said normal school buildings shall proceed and be paid for by warrants drawn upon the fund created by this act which shall draw interest at the rate of seven per cent. per annum, payable annually, and whenever there shall not be sufficient moneys in said fund to pay all outstanding warrants, it shall be the duty of the treasurer to reserve a sufficient amount to pay the interest on all outstanding warrants before paying the principal of any senior outstanding warrants. Whenever there shall not be sufficient moneys in said fund to pay the interest on all outstanding warrants drawn against it, the interest shall be paid on warrants in the order in which they are drawn, and all unpaid interest on junior warrants shall draw interest at the rate of seven per cent. annually. Interest on warrants drawn under the provisions of this act shall be computed from the first day of the month succeeding the date of the warrant."

Warrants were issued under this act between July 13, 1895, and April 30, 1897, to the amount of \$100,000. Warrants numbered 1 to 4, inclusive, for \$50 each, were issued on July 13, 1895; No. 5, for \$900, on August 6, 1895, and No. 6, the warrant in this action, for \$54.90, was issued on August 19, 1895. There has come into the state normal school fund from the sale of lands granted to the state for normal schools since 1895 the sum of \$7,000, which is sufficient to pay the interest on warrants 1 to 6 inclusive, although not sufficient to pay the interest on all the warrants issued upon said fund. No part of this money has been paid out as interest or principal on any of the warrants, or otherwise, or invested as a permanent fund; nor has any part of this money been received as interest or income from said land grant or the proceeds thereof. The treasurer refuses to pay the interest upon relator's warrant for two principal reasons: (1) That the proceeds arising from the sale of normal school lands constitute a permanent fund, the interest or income only of

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which may be appropriated in support of said normal schools, and that the act of 1895, *supra*, is in contravention of the enabling act, because it undertakes to appropriate the proceeds themselves; (2) that no appropriation has been made for the payment of interest upon the warrants in question, or any of the warrants issued by authority of said act.

A determination of the first question involves the construction of the act of Congress admitting the state into the Union, approved February 22, 1889, and commonly known as the "Enabling Act." The provisions of that act relative to the question under consideration are as follows:

"Sec. 10. That upon the admission of each of said states into the Union, sections numbered 16 and 36 in every township of said proposed states, and where such sections, or any part thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states for the support of common schools, such indemnity lands to be selected within said states in such manner as the legislature may provide, with the approval of the secretary of the interior: Provided, That the 16th and 36th sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character, be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.

"Sec. 11. That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than \$10 per acre, the proceeds to constitute a permanent school fund, the interest of which only

shall be expended in the support of said schools. But said lands may, under such regulations as the legislatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

Section 12 grants fifty sections of unappropriated public lands for the purpose of erecting public buildings at the capital of each state for legislative, executive, and judicial purposes; and § 13 provides that five per centum of the proceeds of sales of public lands within the states, sold subsequent to the admission of the states, shall be paid to the states as a permanent fund for the support of the common schools.

"Sec. 14. That the lands granted to the territories of Dakota and Montana by the act of February 18, 1881, entitled 'An act to grant lands to Dakota, Montana, Arizona, Idaho and Wyoming for university purposes,' are hereby vested in the states of South Dakota, North Dakota and Montana, respectively, if such states are admitted into the Union, as provided in this act, to the extent of the full quantity of seventy-two sections to each of said states, and any portion of said land that may not have been selected by either of said territories of Dakota and Montana may be selected by the respective states aforesaid; but said act of February 18, 1881, shall be so amended as to provide that none of said lands shall be sold for less than \$10 per acre, and the proceeds shall constitute a permanent fund to be safely invested and held by said states severally, and the income thereof be used exclusively for university purposes. And such quantity of the lands authorized by the fourth section of the act of July 17, 1854, to be reserved for university purposes in the territory of Washington, as, together with the lands confirmed

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to the vendees of the territory by the act of March 14, 1864, will make the full quantity of seventy-two entire sections, are hereby granted in the like manner to the state of Washington for the purpose of a university in said state. None of the lands granted in this section shall be sold at less than \$10 per acre; but said lands may be leased in the same manner as provided in section 11 of this act. The schools, colleges and universities provided for in this act shall forever remain under the exclusive control of the said states, respectively, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be for the support of any sectarian or denominational school, college or university. The section of land granted by the act of June 16, 1880, to the territory of Dakota for an asylum for the insane shall, upon the admission of said state of South Dakota into the Union, become the property of said state."

"Sec. 16. That 90,000 acres of land, to be selected and located as provided in section 10 of this act, are hereby granted to each of said states, except to the state of South Dakota, to which 120,000 acres are granted, for the use and support of agricultural colleges in said states, as provided in the acts of Congress making donations of lands for such purpose.

"Sec. 17. That in lieu of the grant of land for purposes of internal improvements made to new states by the eighth section of the act of September 4, 1841, which act is hereby repealed as to the states provided for by this act, and in lieu of any claim or demand by the said states, or either of them, under the act of September 28, 1850, and section 2479 of the revised statutes, making a grant of swamp and overflowed lands to certain states, which grant it is hereby declared is not extended to the states provided for in this act, and in lieu of any grant of saline lands to said states, the following grants of land are hereby made, to wit: To the state of South Dakota: For the school of mines, 40,000 acres; for the reform school, 40,000 acres; for the deaf and dumb asylum, 40,000 acres; for

the agricultural college, 40,000 acres; for the university, 40,000 acres; for state normal schools, 80,000 acres; for public buildings at the capital of said state, 50,000 acres; and for such other educational and charitable purposes as the legislature of said state may determine, 170,000 acres; in all 500,000 acres. To the state of North Dakota a like quantity of land as is in this section granted to the state of South Dakota; and to be for like purposes, and in like proportion as far as practicable. To the state of Montana: For the establishment and maintenance of a school of mines, 100,000 acres; for state normal schools, 100,000 acres; for agricultural colleges, in addition to the grant hereinbefore made for that purpose, 50,000 acres; for the establishment of a state reform school, 50,000 acres; for the establishment of a deaf and dumb asylum, 50,000 acres; for public buildings at the capital of the state, in addition to the grant hereinbefore made for that purpose, 150,000 acres. To the state of Washington: For the establishment and maintenance of a scientific school, 100,000 acres; for state normal schools, 100,000 acres; for public buildings at the state capital, in addition to the grant hereinbefore made for that purpose, 100,000 acres; for state charitable, educational, penal and reformatory institutions, 200,000 acres. That the states provided for in this act shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act. And the lands granted by this section shall be held, appropriated and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective states may severally provide."

It will be observed that § 10 grants to each of the states named in the act sections 16 and 36 in every township "*for the support of common schools*"; that § 14 grants to the state of Washington for the purposes of a university, seventy-two sections of land "*in like manner*"; that is, "the proceeds shall constitute a permanent fund to be safely invested and held by said states severally, and the income thereof be used exclusively for university

purposes"; that § 16 grants to the state of Washington 90,000 acres of land for the use of the agricultural college, "as provided in the act of congress making donations of land for such purposes; that § 17, in lieu of the grants of land made by § 8 of the act of September 4, 1841, and by the act of September 28, 1850, and § 2479 of the Revised Statutes and in lieu of any grant of saline lands, grants to this state, for the establishment and maintenance of a scientific school, 100,000 acres; for state normal schools, 100,000 acres; for public buildings at the state capital in addition to the grant hereinbefore made, 100,000 acres; for state, charitable, educational, penal, and reformatory institutions, 200,000 acres. "And the lands granted by this section shall be held, appropriated and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective states may severally provide."

It is contended by the relator that the last sentence of § 17 contains the only limitation upon the legislature with reference to the disposition of the lands granted for state normal schools, and that the limitation contained in § 11 has reference only to sections 16 and 36 granted by § 10 of the enabling act for the support of *common schools*; and a very plausible argument is made to sustain this contention. But this argument necessarily eliminates § 11 of this act as an independent section of the act, and also limits the general words therein used, namely, "*all lands herein granted for educational purposes*," to mean all lands in § 10 granted for common-school purposes. If congress intended § 11 to be only a limitation to § 10, and not apply to the whole act, it was very unfortunate in the use of words to express that intention, even if the making of § 11 an independent section was an inadvertence. But, taking the section as we find it, an independent section, in con-

nection with the general words used, it seems conclusive to our minds that congress intended to make it refer, not only to the preceding section, but to the whole act, and that the words "*herein*" and "*educational purposes*" were used advisedly, and refer to all lands granted for such purposes in the whole act. It is true that, with this construction placed upon § 11, the provision found in § 14, as follows, "None of the lands granted in this section shall be sold at less than \$10 per acre, but said lands may be leased in the same manner as provided in § 11 of this act," was not necessary. But this provision was evidently inserted to avoid the possibility of a construction that university lands might be sold, under provisions of the act of 1854, at less than \$10 per acre. The clause in § 17, as follows, "And the lands granted by this section shall be held, appropriated and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective states may severally provide" refers to the *manner* of holding and of appropriating and of disposing of the lands, and must be construed with reference to the limitations contained in § 11 as to lands granted for educational purposes. The manner of the disposition or the sale of such lands, and the manner of the holding or the investment of the proceeds, and the appropriation of the interest or income, is subject to the limitations contained in § 11 of the act. The states of North Dakota, South Dakota, and Montana have all placed the above construction upon the grant of lands for normal schools by adopting constitutional provisions declaring the proceeds of such lands a permanent fund. See Constitution, North Dakota, art. 9, § 159; Constitution, South Dakota, art. 8, § 7; Constitution, Montana, art. 11, § 12. We think this construction accords with the general policy of the federal

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government towards educational institutions named in the enabling act. It does no violence to any of the provisions of the act, and conduces to the permanency of the normal schools. If we are correct in this construction of the enabling act, it follows that the act of the legislature of 1895 is void, in so far as it attempts to appropriate the proceeds of the lands granted for normal schools instead of the interest and income thereof, and that the treasurer cannot be compelled to pay out any part of the funds derived from the sale of the lands for either principal or interest on the warrant in question. *Romaine v. State*, 7 Wash. 215 (34 Pac. 924).

This conclusion may work a hardship upon the holders of warrants issued under the act of 1895, who have in good faith given to the state value therefor; but the state in justice ought to, and no doubt will, make provision for the payment of the warrants thus issued.

Entertaining these views, it is unnecessary to discuss other questions presented.

The writ is therefore denied.

FULLERTON, C. J., and HADLEY and DUNBAR, JJ., concur.

[No. 4317. Decided February 25, 1903.]

CITY OF SEATTLE, *Respondent*, v. R. W. BARTO, *Appellant*.

31	141
31	193
31	141
34	84
34	108

MUNICIPAL CORPORATIONS — ORDINANCES — SINGLENESSE OF OBJECT.

An ordinance regulating and licensing the carrying on of business by auctioneers, second-hand dealers, bill posters, hotel runners, pawn brokers and persons engaged in the temporary sale of goods cannot be regarded as enumerating more than one object of legislation, as it has as its general purpose the protection of

the public against certain occupations deemed inimical to the public good if allowed to be conducted without restrictions.

SAME — SUFFICIENCY OF TITLE.

Where the title of an ordinance states that it is "an ordinance to license and regulate certain trades and occupations in the city," it sufficiently expresses the object of the ordinance without enumerating in the title the several occupations mentioned in the body of the act.

SAME — PAWNBROKERS — LICENSE FEES — EXCESSIVENESS.

A license fee of \$100 per annum upon the business of pawnbroking cannot, as a matter of law be said to be arbitrary and excessive, and therefore a tax on business, but, such business being a proper subject of police regulation, it is within the province of the municipality to make the business bear the cost of surveillance, the fairness of which the courts will not inquire into on any mere difference of opinion between the municipal authorities and those engaged in the regulated business, in the absence of any proof on the question of the excessiveness of the charge.

Appeal from Superior Court, King County.—Hon. ARTHUR E. GRIFFIN, Judge. Affirmed.

Tucker & Hyland, for appellant.

Ellis De Bruler, for respondent.

The opinion of the court was delivered by

FULLERTON, C. J.—The appellant was convicted of the offense of engaging in the business of a pawnbroker in the city of Seattle without first having procured a license therefor, as required by an ordinance of the city, and from the judgment of conviction appeals. The question presented by the record is the validity of the ordinance under which the conviction was had. The several objections made we shall notice in order.

It is said first that the ordinance contains more than one object. The charter of the city of Seattle (Freeholders' 1896, art. 4, § 10) contains the following provision: "Every legislative act of this city shall be by ordinance.

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Every ordinance shall be clearly entitled and shall contain but one object, which shall be clearly expressed in its title." The ordinance in question is entitled as follows: "An ordinance to license and regulate certain trades and occupations in the city of Seattle, providing penalties for the violation thereof, and repealing all ordinances inconsistent therewith." The body of the ordinance contains provisions relating to the licensing and regulation of various trades and occupations, among which are auctioneers, second hand dealers, billposters, hotel runners, persons engaged in the temporary sale of goods, and the business engaged in by the appellant, that of a pawnbroker. The contention is that these several trades and occupations are so far distinct as to require that legislation governing and regulating them be by several and distinct ordinances, and that they cannot be joined in one ordinance, no matter how specific the title of that ordinance may be made. But it was not intended by the requirement contained in the charter that the city council should not pass an ordinance having a general object, and bring within its terms all matters pertaining to that object, whether it embrace a number of persons or a variety of trades and occupations. The term "object" was not used in the sense of "number" or "variety," nor was it intended to require a distinct legislative act for each particular matter legislated upon. It was intended to prevent the union in one act of diverse, incongruous, and disconnected matters, having no relation to or connection with each other, but was not intended to prevent the law-making power from enacting under a general title provisions affecting a variety of matters, so long as there is a natural connection between the several matters and the object named in the title. As was said by this court in *Marston v. Humes*, 3 Wash. 267 (28 Pac. 520), when

speaking of the use of the words "subject" and "object" as used in constitutions with reference to legislative enactments:

"There are two ways in which the words thus used can be interpreted. One is to hold that the word 'subject' is not capable of further reduction; the other is to hold that it means a single subject in a more enlarged sense, in which may be included a large number of sub-subjects. To hold that the constitution makers intended the first interpretation would be to convict them of intention to so tie the hands of the legislature as to make legislation extremely difficult, if not impossible; while the other construction will substantially subserve the object which they had in view and at the same time leave the legislature free to legislate in a reasonable manner. I am of the opinion that the legislature must be the judge of the scope which they will give to the word 'subject,' and that so long as the title embraces but one subject it is not inimical to such constitutional provision, even although the subject as thus used contains any number of sub-subjects. As I have suggested, any other rule would make legislation practically impossible. I do not suppose it will be contended that a title would be void which provided that the enactment was to be upon the subject of pleading. It will be admitted by almost every one that that was a single subject, yet if we construe the word in its more narrow sense it contains many subjects, and the title would be clearly bad, and the legislature would be driven to enact separate laws upon the subject of complaints, answers, replies, etc., etc. If we hold 'pleading' to be a sufficient identification and unification of the subject, it is because we say the legislature has seen fit to make that a single subject. Again, it would hardly be contended that it is not competent under the provision in question for the legislature to enact as a single law a code of civil procedure, and that an act entitled 'An act to provide a code of civil procedure' would be invalid, yet under this subject innumerable subheads and subjects can easily be carved out. Such title is good because the legislature has seen fit to take a comprehensive

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subject which can properly cover all of such subjects. If the legislature can thus by a name sufficiently comprehensive embrace all of the subjects properly relating to civil procedure, it must follow that by adopting a subject sufficiently general it can embrace in one act all the statute law of the state. In other words the legislature may adopt just as comprehensive a title as it sees fit, and if such title when taken by itself relates to a unified subject or object, it is good, however much such unified subject is capable of division."

So Mr. Cooley, in his work upon Constitutional Limitations, uses this language:

"The generality of a title is therefore no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection. The legislature must determine for itself how broad and comprehensive shall be the object of a statute, and how much particularity shall be employed in the title in defining it." Cooley, Constitutional Limitations (6th ed.), p. 172.

Under the rules here announced, the ordinance in question contains nothing not germane to its title. Its purpose was to regulate certain trades and occupations deemed inimical to the public good if allowed to be conducted without restrictions. It had, therefore, a general purpose, namely, the protection of the public, and but one object within the meaning of the charter provision.

The next objection is that the title of the ordinance does not sufficiently express its object. This seems to be based upon the fact that the several occupations mentioned in the body of the act, and for which licenses are required, are not enumerated in the title but are covered, if covered at all by the general designation of "certain trades and occupations." But a title, to be sufficient, need not be an index to the provisions of the ordinance. It is sufficient

if it gives such notice of its object as to reasonably lead to an inquiry into its body. "The purpose of the title is only to call attention to the subject-matter of the act, and the act itself must be looked to for a full description of the powers conferred." *Lancey v. King County*, 15 Wash. 9 (45 Pac. 645, 34 L. R. A. 817). The title of the act in question is thus specific. It calls attention to the fact that there are trades and occupations which cannot be pursued in the city of Seattle without a license, and one examining the title would not be justified in passing it by on the supposition that it contained nothing affecting the business of a pawnbroker.

Lastly, it is said that the fee exacted by the ordinance for the privilege of engaging in the business of pawnbroking is so excessive as to amount to a tax upon the business, and, being a tax, is in violation of § 5 of art. 7 of the state constitution. But we think the constitutional question here suggested is not before us. The amount of the license fee fixed by the ordinance for the business of pawnbroking is one hundred dollars per annum. There is nothing in the record to show what the actual costs are, or what a reasonable charge would be, for enforcing the regulations prescribed, and we are asked to say, as a matter of law, that the amount fixed is so far in excess of any sum that could be legitimately charged for regulating the business as to enter the domain of taxation. We do not feel that we are authorized to do this in the case before us. It is not doubted that the business of pawnbroking is a proper subject of police regulation, nor is it doubted that it is within the province of the municipal authorities to make the business bear the costs of such regulation. As these costs must be prescribed in advance, they must of necessity be based upon estimates which it is the right

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and duty of the municipal authorities to make. The courts cannot, therefore, on any mere difference of opinion as to the amount necessary to meet these costs, say that they are excessive. They must be shown to be so by evidence, or else they must be so exorbitant and arbitrary as to leave no room for two opinions on the matter—so exorbitant and arbitrary as to show that they could not have been based upon any possible estimate of the probable cost. The amount of the fee in question here is not subject to these objections. It cannot be said that it will exceed even the actual cost of surveillance, much less can it be said it is excessive or arbitrary.

Finding no error in the record, the judgment will stand affirmed.

MOUNT and DUNBAR, JJ., concur.

[No. 4411. Decided February 25, 1903.]

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42	432

EMMA P. PLUMLEY, *Appellant*, v. JEANNETTE SIMPSON,
Respondent.

TRIAL—STAY OF PROCEEDINGS UNTIL PAYMENT OF COSTS IN OTHER
ACTION—POWER OF COURT.

An order of the court staying proceedings in an action, until a judgment against plaintiff for costs in a prior action between the same parties involving the same subject-matter was paid, is a valid exercise of the court's powers.

SAME—RECORD IN OTHER CAUSE—JUDICIAL NOTICE.

The fact that such prior judgment was void for want of jurisdiction would not be a matter of which the trial or appellate court could take judicial notice on the motion for stay of proceedings, nor could such record in the prior cause be made available, unless introduced in evidence in the lower court and incorporated in the record on appeal.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Affirmed.

Lyman E. Knapp and *I. D. McCutcheon*, for appellant.

Roberts & Leehey and *J. W. Langley*, for respondent.

PER CURIAM.—On February 6, 1902, the appellant, being then the holder of a certificate of delinquency of certain taxes assessed against lands belonging to the respondent, applied to the superior court for a judgment of foreclosure. A summons in the usual form was issued and served, after which the defendant appeared and moved the court to stay the proceedings until a judgment for costs, which the respondent had obtained against the appellant in another proceeding brought by the appellant to foreclose the same certificate, was paid and satisfied; showing by affidavit accompanying the motion, the facts upon which the motion was based. The affidavit was not controverted, and the trial court, after notice and hearing, granted the stay moved for. The appellant thereafter in open court gave notice of her refusal to pay the judgment entered in the former proceeding, whereupon the court entered a judgment dismissing the pending proceeding. This appeal is from the judgment of dismissal.

In *Schwede v. Hemrich*, 29 Wash. 124 (69 Pac. 643), we held that the trial court had power to require, as a condition precedent to the maintenance of an action, that the plaintiff pay the costs awarded the defendant in another action between the same parties, for the same cause of action, in which a compulsory nonsuit had been entered. It seems to be conceded by the appellant that the principle of that case applies to this action, but she contends that the judgment which the trial court required her to pay as a condition precedent to the maintenance of the present

action is void for want of jurisdiction. To show this fact, she has caused the clerk to certify into this court the entire record of the cause, and asks us to consider it in passing upon the objection made. But this record is not before us. A trial court cannot notice judicially the record of another cause, even though it be between the same parties and in the same court, and what the trial court cannot notice judicially, this court cannot notice. *Bartelt v. Seehorn*, 25 Wash. 261 (65 Pac. 185). To have made the record available, it should have been introduced as evidence in the trial court and brought here by a statement of facts, or bill of exceptions, over the certificate of the trial judge.

Turning to the record properly before us, viz., the motion and affidavit, we see nothing that indicates a want of jurisdiction in the court rendering the judgment. Stripped of their verbiage, the motion and affidavit recite the fact that an action upon this same cause of action by the same plaintiff against the same defendant was begun in the superior court having jurisdiction of the subject-matter, that the action was dismissed by plaintiff, and that costs were adjudged against the plaintiff and in favor of the defendant for the sum of fifteen dollars. This shows a valid, not a void, judgment, and, as the court cannot know judicially what the actual proceedings were, it cannot find the judgment void.

The judgment appealed from is affirmed.

[No. 4450. Decided February 25, 1903.]

THE STATE OF WASHINGTON, *Appellant*, v. CITY OF SEATTLE, *Respondent*.

INTOXICATING LIQUORS — REVENUE FROM LICENSING — DISPOSITION —
STATUTES — REPEAL BY IMPLICATION.

Bal. Code, § 2934, which provides, among other things, that

cities and towns shall pay into the state treasury ten per cent. of the amount collected by them as license fees for the sale of intoxicating liquors has not been superseded or impliedly repealed by subsequent general legislation vesting municipalities with the license and control of the sale of intoxicating liquors, for the reason that the later enactments make no provision for the disposition of the funds arising from such licenses and hence, although doing away with some of the provisions of § 2934, cannot be regarded as a substitute therefor *in toto*.

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Reversed.

W. B. Stratton, Attorney General, for the State.

Mitchell Gilliam and *William Parmerlee*, for respondent.

The opinion of the court was delivered by

FULLERTON, C. J.—This action was brought by the state of Washington against the city of Seattle to recover ten per centum of the amount collected by that city between January 1, 1902, and the commencement of the action as license fees for the sale of intoxicating liquors. A general demurrer was interposed to the complaint, which the trial court sustained. Judgment of dismissal and for costs against the state followed, from which judgment the state appeals.

But one question is suggested by the record: Has that part of the second section of the act of February 2, 1888 (§ 2934, Ballinger's Code) which requires cities and towns to pay into the state treasury ten per centum of the amount collected by them as license fees for the sale of intoxicating liquors, been superseded by subsequent legislation? The question was decided affirmatively by the court below on the authority of the opinion of this court rendered in the case of *Seattle v. Clark*, 28 Wash. 717 (69

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Pac. 407), where it is said that the entire section in question was superseded. The case itself, however, did not present so broad a question. The act of 1888, vesting in cities and towns the power to control the sale of intoxicating liquors within their respective boundaries, undertook to define in a measure the limits of the power; that is to say, it placed it within the power of the city or town to prohibit altogether the sale of intoxicating liquors within its boundaries, it fixed a minimum and a maximum amount that could be charged as a license fee in case licensing should be resorted to, it required that the sum charged as a license fee should be collected annually in advance, it required that ten per centum of the license fee collected be paid to the state, and contained other provisions affecting the power of the municipalities with relation thereto. The general act relating to the organization and government of cities and towns, while it vested in the municipal authorities of the several classes of cities and towns organized thereunder the power to license the sale of intoxicating liquors within their respective limits, did not contain many of the limitations prescribed by statute of 1888, nor did it prescribe what disposition should be made of the funds. The question in the *Clark Case* was whether certain of these particular restrictions relating to the amount that could be charged as a license fee were applicable to a city organized under the General Statutes, whose grant of power contained no such restrictions. We held that they did not so apply, and in doing so used the language above referred to. It will be noticed, however, that the question of the disposition of the funds collected as license fees was not involved in that case, nor was it discussed, or even mentioned, in the opinion. What was said, therefore, which may seem to affect the present

question, was said inadvertently, and the case is not decisive of the proposition that the state is not entitled to ten per centum of the license fees collected by cities and towns for the sale of intoxicating liquors therein.

It is insisted, however, that as an independent question the statute of 1888 is repealed by the General Statutes above referred to, under the rule cited in the case of *Seattle v. Clark*, *supra*, namely, that

“Every statute must be considered according to what appears to have been the intention of the legislature, and even though two statutes relating to the same subject be not, in terms, repugnant or inconsistent, if the later statute is clearly intended to prescribe the only rule which should govern the case provided for it will be construed as repealing the original act. The rule does not strictly rest upon the ground of repeal by implication, but upon the principle that when the legislature makes a revision of a particular statute, and frames a new statute upon the subject-matter, and from the framework of the act it is apparent that the legislature designed a complete scheme for this matter, it is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is discarded. It is decisive evidence of an intention to prescribe the provisions contained in the later act, as the only ones on that subject which shall be obligatory.”

This court has, in common with many other courts, applied the rule to statutes where it was clearly apparent that the one was intended as a substitute for the other, although there was no special repeal of that other, and the two statutes were not entirely repugnant. The most notable instances of this from this court are found, perhaps, in the cases of *State v. Carbon Hill Coal Co.*, 4 Wash. 422 (30 Pac. 728), and *Mansfield v. First National Bank*, 5 Wash. 665 (32 Pac. 789, 999). But the rule and the cases cited are not applicable to the question now before us. Here there was no new enactment covering the matter

of the disposition of the funds collected by cities and towns as license fees for the sale of intoxicating liquors. This subject is not mentioned at all in the new legislation, and if it were necessary to find from the new statute what disposition was intended to be made of such funds, it would have to be gathered by implication from the statute as a whole, not from any particular provision therein. This is not sufficient to work a repeal of a direct and positive statute prescribing what disposition shall be made of such fund, and we cannot hold that any such repeal was effected or intended. We conclude, therefore, that the complaint states a cause of action.

The judgment of the lower court is reversed, and the cause remanded, with instructions to overrule the demurrer, and require the respondent to answer to the merits.

DUNBAR and MOUNT, JJ., concur.

[No. 4519. Decided February 25, 1903.]

HENRY YOUNG *et al.*, Respondents, v. CITY OF TACOMA,
Appellant.

**MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS — INVALIDITY OF
ASSESSMENT — REASSESSMENT.**

Under Laws 1893, p. 226, which authorizes the making of a reassessment for the cost of public improvements when an assessment has been "set aside, annulled, or declared void by any court, either directly or by virtue of any decision of such court," a city would have jurisdiction to order a reassessment where a portion of an assessment had been invalidated at the suit of a part of the property holders affected thereby.

SAME — COST OF FUTURE REPAIRS — INCLUSION IN ASSESSMENT.

An assessment for the construction of a street improvement cannot, under the city charter of Tacoma, include an assessment

31	153
35	375
31	153
42	272
442	376

for future repairs to be made to the work so constructed (*McAllister v. Tacoma*, 9 Wash. 272, followed).

SAME — CONTRACT TO KEEP IN REPAIR — QUESTION FOR JURY.

A contract requiring a street contractor to give a bond to the city conditioned that he would at his own expense keep the work done by him in thorough repair from injury by traffic, decomposition and decay for the term of five years from the completion of the contract cannot be determined as a matter of law to be a provision for future repairs, but raises a question of fact to be determined from evidence showing the quality of material employed and the effect of climatic conditions.

SAME — DEDUCTION FROM ASSESSMENT OF ADDED COST OF REPAIRS.

The mere fact that the expense of future repairs may have been included in the original assessment for a street improvement would not invalidate proceedings for a reassessment, but the added cost occasioned in view of the possibility of future repairs should be determined and deducted from the total amount, and reassessment made to cover the balance.

SAME — OBJECTIONS TO ASSESSMENT NOT RAISED BEFORE CITY COUNCIL.

Objections to the inclusion in a street assessment of items for the expense of inspection and engineering on the improvement and of paving between the street railway tracks cannot be urged in the superior court, when they were not specially raised before the city council.

SAME — COST OF STREET CROSSINGS — ASSESSMENT AGAINST ABUTTING OWNERS.

Where a city is given general power over street improvements, without any charter or statutory restriction as to the method of paying the cost of street intersections, such cost may properly be assessed upon the property abutting on the street.

SAME — REASSESSMENT — INTEREST.

In making a reassessment for a street improvement, interest from date fixed for delinquency of the original assessment is properly included therein (*Lewis v. Seattle*, 28 Wash. 639, followed.)

SAME — LIMITATIONS — EXTENSION BY LATER STATUTE.

Where the limitation provided for the commencement of actions affecting street assessments was extended after the accrual of a cause of action thereon, but before the expiration of the limitation in force at the time of such accrual, actions on such street assessment would not be barred until the lapse of the extended period of limitation.

Feb. 1903.] Opinion of the Court.—HADLEY, J.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM O. CHAPMAN, Judge. Reversed.

William P. Reynolds and *Emmett N. Parker*, for appellant.

A. R. Titlow, *E. M. Hayden* and *James Garvey*, for respondents.

The opinion of the court was delivered by

HADLEY, J.—This appeal is from a judgment of the superior court setting aside and declaring void a reassessment made by the city of Tacoma in certain reassessment proceedings for street improvements made upon a portion of Pacific avenue, in said city. The original proceedings for the improvement were begun in 1893, and provided for paving the street with bituminous rock upon a concrete foundation, and with granite curb stones on both sides of the street. Such proceedings were had that in August, 1893, a contract was entered into between the city of Tacoma and the Tacoma Bituminous Paving Company, by which the said company undertook to construct said work according to the plans and specifications prepared therefor. The contract price was \$69,950. An assessment district was created, and the entire cost of the improvement was assessed to the abutting property within the district. The assessment was confirmed in 1894. Thereafter, in 1898, the city instituted reassessment proceedings. The respondents entered objections to the reassessment before the city council, and from an order of the city council denying their objections, and confirming the reassessment roll, they appealed to the superior court. That court entered judgment to the effect that the entire reassessment is void, and the city has appealed to this court.

It is assigned that the court erred in making its seventeenth finding of fact, which is to the effect that the city attempted to collect said assessment under and by virtue of said original assessment, and thereafter abandoned said original assessment, and attempted to make a new assessment upon said property. The court simply finds that the assessment was "abandoned" by appellant, and it is not found that the original assessment had been declared void by some court of record. The statute authorizing reassessments (Session Laws 1893, p. 226) provides that when an assessment has been "set aside, annulled or declared void by any court, either directly or by virtue of any decision of such court," the city may make a new assessment. Respondents urge that there was never any such decision by a court, and, further, that there was a decision declaring the assessment to be valid. The record of another cause was introduced in evidence, from which it appears that certain property holders assailed the original assessment and asked to have it annulled as to their property. The court entered findings of facts and conclusions of law in that case, which were filed January 7, 1897. The conclusions of law entered upon the findings are that, as to certain plaintiffs in that action who signed a certain remonstrance, the assessment was valid, but as to others who did not sign such remonstrance it was void. The record does not disclose that any judgment was ever entered upon said findings and conclusions, and the case rests upon the mere decision of the court as embodied in the findings and conclusions. It will be noted that the decision of the court declares a portion of the assessment valid and a portion void, but we cannot agree with respondents that the record of that case shows an affirmative holding that the original assessment was valid. The validity of the assessment as to any portion of the property is

dependent upon its validity as to all the property affected. There is such an interdependent relation between all the property in an assessment district as makes it necessary that the assessment shall be valid as to all the property properly within the district; and, if not so, the whole assessment becomes void. It would be a harsh rule that would require certain property holders to pay an assessment while others equally benefited are permitted to escape that burden. The special fund to be created depends upon such provisions as shall secure the payment of the whole in order to meet the obligations incurred on the faith thereof. There was no actual judgment annulling the original assessment or any portion of it, but there was a decision of a competent court, regularly entered in the cause instituted for that purpose, holding a portion of the assessment void; and, if that decision is to be given any force at all in the premises, for the reasons already stated it must be held that its effect was to declare void the whole assessment. It will be observed that the statute does not require that an actual judgment shall be entered setting aside the original assessment, but if the assessment is declared void, "either directly or indirectly, by virtue of any decision of such court," it is sufficient to authorize the reassessment. We think the decision mentioned was sufficient to confer jurisdiction for reassessment proceedings under the statute and under the holdings of this court in the following cases: *State ex rel. Hemen v. Ballard*, 16 Wash. 418 (47 Pac. 970); *Tumwater v. Pix*, 18 Wash. 153 (51 Pac. 353); *Port Angeles v. Lauridsen*, 26 Wash. 153 (66 Pac. 403).

Since we entertain the views above expressed, it is unnecessary to discuss other points urged by appellant under this assignment of error.

It is assigned that the court erred in its twenty-fifth

finding of fact. That finding is to the effect that the contract for the improvement of the street required the contractor to give a bond to the city in an amount equal to the contract price, conditioned, among other things, that he would at his own expense keep the work done by him in thorough repair from injury by traffic, decomposition, and decay for the term of five years from the completion of the contract. It is further found by the court that the inclusion of the provision requiring the contractor to keep the work in repair added substantially to the contract price, but that it is impossible from the evidence to determine the amount of the additional cost by reason of such provision. Respondents contend that by reason of the foregoing there is an attempt here to assess at this time for repairs to the street, and it is insisted that this cannot be done under the holding of this court in *McAllister v. Tacoma*, 9 Wash. 272 (37 Pac. 447, 658). In that case it was made a condition of the bids that a bond should be given guarantying the pavement for five years, and it was held that this requirement had the effect of making the abutting property owners pay for repairs for a period of five years, which could not be done, for the reason that nothing in the charter authorized such an assessment for repairs. Appellant insists that this court must have overlooked a charter provision which, it urges, does authorize such an assessment. The language of the charter (Freeholders' 1890, § 52, subd. 13) to which we are referred is that the city has power "to determine what work shall be done or improvements made." Appellant contends that the above language is so broad and comprehensive that it should be held to include repairs, when the city has determined to include them in an assessment, and that this court was in error when it said, in the case cited, "There is nothing in the charter on the subject of repairs to

streets." We think the construction urged by appellant is too sweeping, and we believe that the words used in the charter refer rather to the kind and character of the improvement in its original construction, and that, in the absence of words specifying repairs, the language used should not be held to include them. We therefore adhere to the holding in *McAllister v. Tacoma*, *supra*, that an assessment for the construction of a street improvement under the city charter cannot include an assessment for future repairs to be made to the work so constructed. Appellant, however, urges that the repair requirement in this case was in substance nothing more than a required guaranty of the quality of the work, since it called only for repairs necessary to keep the work from injury by "traffic, decomposition, and decay." It is claimed that since there is no requirement for general repairs necessitated by other causes than those specified, the provision related only to the inherent quality of the work and material, and amounted only to a guaranty that the quality of the work and material required by the contract would be properly observed in its original construction. If the repairs contemplated by this contract and bond include anything not arising as an incident to defective work and material in the original construction, then, doubtless, an additional burden is imposed upon the property by way of added expenses for repairs not occasioned by mere defective work and material, and such additional expense for repairs in the future cannot be enforced against abutting property within the rule announced by this court. Whether necessary repairs arising from "traffic, decomposition, and decay," within a period of five years are due wholly to defects in original construction must depend in some measure upon the nature of the improvement and its environment as to the amount of traffic and climatic condi-

tions. If made of wood, it is not improbable that traffic upon a much traveled street may make such repairs necessary within the period named, even though the best materials were used in the first instance; and it is also possible that good material of that class may decompose and decay to the extent of requiring repairs. Whether the best recognized material of the class used in the case at bar, when properly constructed and placed, will withstand all traffic and all ordinary action of the elements for a period of five years, it seems to us is a matter of so much uncertainty that it would be impossible to undertake to determine, as a matter of law, from the language of the contract and bond in question that it extends no further than a mere guaranty against defective construction and material. That is a matter that can only be determined from evidence. Appellant cites a number of cases from other jurisdictions, some of which have been decided since *McAllister v. Tacoma*, *supra*, which hold that similar contracts to the one now under consideration are not contracts for repairs, but amount only to a guaranty of proper original construction, and that no additional expense is necessarily entailed upon abutting property by reason thereof. While some of those cases are well considered, and may be regarded as strong authority, yet we do not deem it necessary to review them here. The courts are by no means harmonious upon this subject, but, as we have seen, it is not a new question in this court since the decision in *McAllister v. Tacoma*, *supra*. The view there announced is also in harmony with that of the following cases: *Portland v. Bituminous, etc., Co.*, 33 Ore. 307 (52 Pac. 28, 44 L. R. A. 527, 72 Am. St. Rep. 713); *Kansas City v. Hanson*, 8 Kan. App. 290 (55 Pac. 513); *Alameda Macadamizing Co. v. Pringle*, 130 Cal. 226 (62 Pac. 394, 52 L. R. A. 264, 80 Am. St. Rep.

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124); *People ex rel. Hall v. Maher*, 9 N. Y. Supp. 94; *Verdin v. St. Louis*, 131 Mo. 26 (33 S. W. 480); *Fehler v. Gosnell*, 99 Ky. 380 (35 S. W. 1125).

But while we think the expense of future repairs cannot be added to the assessment, yet the mere fact that they may have been so added should not be held to invalidate the whole assessment in this proceeding to reassess. This is a proceeding to determine the amount that shall now be assessed against the property, and, if any sum was improperly included in the cost price, it should be deducted from the total amount, and a proper reapportionment of the balance should be assessed. This rule was pursued in *Fehler v. Gosnell*, *supra*, where a similar condition was presented, and we think it the just method. What, then, was the additional cost by reason of this provision in the contract and bond? The trial court found that the cost was materially increased, but that the amount could not be determined from the evidence. There was, however, evidence bearing upon that subject, and, while it may not have been of the most convincing character, yet it seems to us, if the court could find from the evidence that the cost was materially increased, it could, based upon evidence in this record, have determined the amount of such increase. It often happens that courts are not satisfied in their own minds as to what may be the exact truth; but, realizing that they must depend upon the frailties and imperfections of human testimony, it becomes their province to make some findings as to material facts when there is any evidence upon the subject. It therefore seems to devolve upon us to make a finding upon this subject. The witness Brown was an officer of the paving company, and as such may be said to be interested. He testified, over objection, that no added cost was considered by his

company on account of the repair requirement when the bids were submitted. His testimony showed, however, that during the five year period his company repaired the street at least three times, the expense of which was borne by the company. It would seem to be almost without the rule of ordinary business experience that his company should have been in no way influenced in the amount of its bid by this prospective and probable expense. The only remaining witnesses upon this subject were Mr. Rydstrom and Mr. Huson. They placed the amount ordinarily added to a bid by reason of such a repair requirement at from ten per cent. to twenty per cent. It is true they did not know what sum was actually added in this case, but they testified as experts familiar with ordinary methods in such cases. Their testimony is in the record without objection, with no motion to strike it, and it is the only direct testimony touching any definite amount. The trial court found that the cost was increased, which we are unwilling to disturb under the evidence; and we think that a further finding must be made as to the amount of such increase, based upon the testimony of the witnesses named. In view of their qualifying expressions as to circumstances that would increase the amount over ten per cent., we think the amount should be fixed at the minimum sum named by them. We therefore find that the cost was increased ten per cent. by reason of the repair requirement, and that amount should be deducted from the total assessment.

It is urged by respondents that items for the expense of inspection and engineering, which were included in the cost price, cannot be included in the reassessment, and the same contention is made as to the cost of that portion of the pavement lying between the street railway tracks and for the space of two feet outside of the rails. The

latter contention is based upon the claim that by an ordinance of the city the street railway company, as a condition of its franchise, was required to pave the space above named. Appellant insists that the ordinance in existence at the time this work was done did not contain such a requirement. But, in any event, this objection was not raised before the city council; and the same is true of the objection now urged concerning engineering expenses. Respondents contend that certain general objections are broad enough to cover these points, but we think not. We find no language in the objections that can be said to have directed the attention of the council to these subjects. The city council is the initiatory tribunal for the hearing of objections, and the objections should be so specifically made there that there can be no doubt as to what that body actually considered and determined. Within the rule announced by this court in *Annie Wright Seminary v. Tacoma*, 23 Wash. 109 (62 Pac. 444), and *McNamee v. Tacoma*, 24 Wash. 591 (64 Pac. 791), and other decisions of this court there cited, we think these objections should have been specifically made in the record before the city council, and that they cannot be raised for the first time in the superior court, an appellate tribunal in this instance; and for the same reason they cannot be urged in this court.

Respondents also contend that the cost of street intersections was improperly included in the assessment. The charter grants the following powers: "To determine what work shall be done or improvements made at the expense in whole or in part of the owners of the adjoining contiguous or proximate property, or others specially benefited thereby." The power thus conferred is general. When the charter or statutory authority specifies no particular method of paying the cost of street intersections, it

is held that the assessing power may assess the cost upon the property abutting the streets. *Creighton v. Scott*, 14 Ohio St. 438; *Cunningham v. Peoria*, 157 Ill. 499 (41 N. E. 1014); *Conde v. Schenectady*, 164 N. Y. 258 (58 N. E. 130); Burroughs, *Taxation*, p. 475. We therefore think the city in this instance had the power to assess the cost of street intersections as it did.

Respondents contend that interest was improperly included by the city council in the reassessment. This question was determined by the decision in *Lewis v. Seattle*, 28 Wash. 639 (69 Pac. 393), and by other cases there cited. Interest from the date fixed for delinquency of the original assessment was properly included in the reassessment.

The statute of limitations is also urged. The original assessment was confirmed in 1894. The limitation at that time, as construed by this court in *Spokane v. Stevens*, 12 Wash. 667 (42 Pac. 123), was two years. In 1895 a ten-year limitation act was passed, which went into effect prior to the expiration of two years from the confirmation of the first assessment. The statute was therefore extended, and this proceeding is not barred. *State ex rel, Hemen v. Ballard*, *supra*; *Bowman v. Colfax*, 17 Wash. 344 (49 Pac. 551).

This disposes of all the questions raised which we deem it essential to discuss. For reasons stated, the judgment is reversed, and the cause remanded with instructions to the court below to enter judgment modifying the reassessment made by the city in the following particular only, viz.: An amount equal to ten per cent. of the original cost of the improvement shall be deducted from the total reassessment, and the remainder shall be apportioned upon all the property described in the reassessment roll in the same relative ratio as now set forth in the roll, with inter-

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est added as herein indicated. The appellant shall recover the costs of the appeal.

FULLERTON, C. J., and MOUNT and DUNBAR, JJ.,
concur.

[No. 4522. Decided February 25, 1903.]

C. L. HAGGARD, *Respondent*, v. JOHN SANGLIN, *Appellant*.

TEMPORARY RECEIVER — APPLICATION FOR APPOINTMENT — SERVICE OF NOTICE.

Under Bal. Code, § 4886, which provides that one who has appeared in an action is entitled to notice of all subsequent proceedings, which notice, under *Id.*, § 4886a, shall be at least three days' notice, in the case of motions and applications, four days' notice of the filing of an amended complaint and of a motion for the appointment of a temporary receiver thereunder was sufficient, when served upon the attorney for defendant who had appeared generally in the action and demurred to the original complaint.

Appeal from Superior Court, King County—Hon. BOYD J. TALLMAN, Judge. Affirmed.

H. E. Foster, for appellant.

Leopold M. Stern, for respondent.

The opinion of the court was delivered by

HADLEY, J.—This is an action to foreclose a chattel mortgage. A general demurrer to the complaint was interposed by the defendant in the action. Afterwards, by leave of court, an amended complaint was filed, which was served upon the counsel for the defendant, who had appeared by demurrer to the original complaint. Service of a copy of the amended complaint was duly acknowl-

edged September 11, 1902. On the same day a motion for the appointment of a temporary receiver to take charge of the mortgaged property pending the suit was, by the plaintiff, served upon the said counsel for defendant, and at the same time a notice was likewise served, calling for the hearing of the motion on September 15, 1902. At the time fixed in the notice for hearing the defendant, by written motion, which he denominated a "special appearance," moved to strike from the files the motion of the plaintiff for the appointment of a temporary receiver for the sole alleged reason that no notice of the hearing of said application had been given or served as required by law. The motion of defendant was denied. Thereupon the court considered the amended complaint and affidavits in support of the motion for a temporary receiver, and such a receiver was appointed. The defendant has appealed.

The error assigned is that the court denied appellant's motion to strike from the files respondent's motion for the appointment of a temporary receiver. The only ground stated in the motion was that sufficient notice had not been given. The motion of respondent called for the appointment of a temporary receiver only. It was held in *Cole v. Price*, 22 Wash. 18 (60 Pac. 153), that a temporary receiver may be appointed without notice, when sufficient emergency is made to appear, but within reasonable time thereafter a hearing must be had as to whether the receivership shall be made permanent or not. Under the authority of the above case the court had power to appoint a temporary receiver in this case without notice, unless appellant's previous appearance entitled him to notice. The order of appointment that was entered does not, in terms, specify that the appointment is a temporary one; but since respondent's motion called for nothing more than a temporary appointment, such must have

been the only effect of the order, if appellant had insisted upon the further hearing. No hearing upon the merits was sought by appellant. No objection was made to the sufficiency of the complaint or affidavits. He relied solely upon the alleged ground that he had not legal notice. This contention is, we think, without merit, under the facts of this case, even if appellant was entitled to notice. Under § 4886, Bal. Code, one who has appeared in the action "is entitled to notice of all subsequent proceedings," and we may assume for the purposes of this case, but we do not decide, that even the emergency calling for a temporary receiver cannot be urged without notice to one who has appeared in the action. Appellant had already fully appeared in the action by his demurrer to the original complaint. There is no statute requiring a new service of process upon the filing of a mere amended complaint. Service of a copy of the amended pleading is therefore sufficient, and the party is still in court under the former process and appearance. In this case the amended complaint and the motion together constituted an application for the appointment of a temporary receiver. These were served upon the attorney who had theretofore appeared generally for appellant in the same cause. Under § 4886a, Bal. Code, a party who has appeared is entitled to at least three days' notice of motions and applications. The notice in this case was actually four days, to-wit, from September 11th to the 15th. The notice may be served upon the party "or his attorney." The fact that the notice was served upon the attorney who had appeared for appellant in the action was, therefore, sufficient under the statute. Under any view of the case, appellant's contention cannot prevail. If he had not already appeared in the action, then, as we have seen, he was not entitled, as a matter of right, to notice of this particular applica-

tion. If the fact that he had already appeared in the cause entitled him to notice of even an emergency application, then he received such notice as is required by statute.

The judgment is affirmed.

FULLERTON, C. J., and DUNBAR and MOUNT, JJ.,
concur.

[No. 4524. Decided February 28, 1908.]

ELLEN DAVIES *et vir*, Respondents, v. RAPHAEL CHEADLE *et al.*, Appellants.

QUIETING TITLE — POSSESSION UNDER ORAL CONTRACT TO DEVISE —
SUFFICIENCY OF COMPLAINT.

In an action to enforce a contract for a conveyance of land and quiet title thereunder, the complaint states a cause of action when it sets up an oral agreement for the devise of land to plaintiff in consideration of the care of the grantor in his lifetime; that plaintiff was put in possession of the land under said agreement and is still in possession thereunder; that the grantor failed to convey or devise said land to her; that she fully performed and discharged her obligations under the contract by caring for the grantor until his death; and that nothing remains undone to fully execute the contract except a formal conveyance of the legal title.

SAME — EQUITY — RELIEF WARRANTED BY FACTS ESTABLISHED.

Under such circumstances, the facts alleged showed a case for specific performance, but, the jurisdiction of a court of equity having attached, the court was warranted in decreeing that title be quieted, inasmuch as the action was brought by one in possession and having the equitable title against the heirs of the intestate, and such relief is the equivalent of specific performance.

APPEAL — RECITALS IN RECORD — CONTRADICTION BY AFFIDAVIT.

Where the record recites that parties were present in person and by attorney at the time the court's findings of fact were signed, such recital cannot be contradicted by affidavits.

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ADMISSION OF EVIDENCE IN EQUITY ACTION — HARMLESS ERROR.

Error in the admission of testimony will not warrant a reversal of a cause of equitable cognizance, which is triable *de novo* on appeal, if there is sufficient competent evidence to sustain the lower court's findings and judgment.

SPECIFIC PERFORMANCE — ADMISSIBILITY OF EVIDENCE.

Where it is sought to establish an oral contract between parties, the unilateral written agreement of one of them is admissible in evidence as a declaration on his part concerning the subject-matter of the alleged oral contract.,

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Affirmed.

W. F. Hays and *Jesse P. Houser*, for appellants.

John E. Humphries and *Harrison Bostwick*, for respondents.

The opinion of the court was delivered by

HADLEY, J.—This action was brought by respondents against appellants to quiet title. Respondents are husband and wife. They allege in substance that on the 6th day of October, 1901, one Lamar Cheadle, then a resident of King county, Washington, departed this life; that said Lamar Cheadle was unmarried, and left no wife, children, father, or mother surviving him, his only heirs at law being his brother and sister, the appellants herein, Raphael Cheadle and Marinda Schaffer; that said Raphael Cheadle is the administrator of the estate of said Lamar Cheadle; that said Lamar Cheadle, being then the owner of certain real estate described in the complaint, did, on the 13th day of July, 1901, enter into an oral contract with respondent Ellen Davies, by the terms of which it was agreed between them that said Ellen Davies should move into the house occupied by said Lamar Cheadle, which was situate upon the real estate described,

the same being farming land; that she should take possession of the land, superintend the farm and household duties connected therewith, live upon the farm with said Lamar Cheadle during his life, and administer to him and care for him as far as lay within her power during the remainder of his life; that she was to have all the products of the farm, the use of the farm, farming utensils, household furniture, and other property, the same as if all were her own, during the life time of said Lamar Cheadle, and she was to pay him one-third of the money received from the sale of products of the farm during his life time; that at his death all of the real estate in the complaint described, together with the household furniture, farming implements, live stock, and all other personal property belonging to or connected with said farm, should become the property of said Ellen Davies; that said Lamar Cheadle agreed to give, devise, and bequeath all of said property to said Ellen Davies in consideration that she should perform the contract on her part to be performed. It is further alleged that said Lamar Cheadle, as evidence of said agreement, and relating to the property described in the complaint, did, on July 13th, 1901, execute and deliver to said Ellen Davies a statement in writing, of which the following is a copy:

“Adelaide, Wash., July 13, 1901.

“This is to certify that I, Lamar Cheadle, have this day entered into a contract with Mrs. Ellen Davies whereby she agrees to take charge of my farm at Adelaide, Wash., and conduct my house and farm and board and care for me during my life time and also give me one-third of the cash proceeds accruing from said farm, from the sale of fruit, stock and product on said farm during my life, and I agree to bequeath to Mrs. Ellen Davies at my death said farm, together with all stock, farming implements and household goods and furniture belong-

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ing thereto. The reason for not making my last will and testament at once is that I have important business interest that must be adjusted before that can be done, but that as soon as said business matters can be arranged I agree to complete this contract according to the terms herein specified.

“Lamar Cheadle.

“Witness: D. F. Davies, Rose E. Rhodes.” (Seal.)

It is further averred that said Ellen Davies, in pursuance of the terms of said contract, took full and complete possession of said farm and personal property, the same having been delivered to her by said Lamar Cheadle on or about July 13, 1901, and that she at once entered upon the performance of her contract and fully performed the same by administering to said Lamar Cheadle and caring for him until the time of his death; that said respondent has been in full and complete possession and control of all of said property, since the death of said Cheadle, under the terms of said contract. It is further alleged that the deceased left other property sufficient to discharge all his indebtedness existing at the time said contract was made; that said estate is wholly solvent, and that there is sufficient property aside from that included in said contract to pay all debts and liabilities of the estate, including funeral expenses. It is averred that the appellants are claiming that the administrator is entitled to the possession of said personal property and to the control of said real estate, and that said Raphael Cheadle and Marinda Schaffer are claiming to be the owners and entitled to the possession of said real estate, and are demanding of said respondent Ellen Davies that they shall be let into possession of all said property; that said claim of appellants constitutes a cloud upon the title of said Ellen Davies; that in equity said property belongs to her, and that appellants have no right, title, or interest

therein. It is alleged that respondent David F. Davies, as the husband of said Ellen Davies, released to her all community rights in the proceeds of said contract, and that the same is her separate property. The complaint demands that the title to said property be quieted in respondent Ellen Davies. Such proceedings were had that issue was joined upon said complaint, a trial was had before the court without a jury, resulting in a judgment in favor of respondents in accordance with the demand of the complaint. From that judgment this appeal is prosecuted.

It is assigned as error that the court overruled appellants' demurrer to the second amended complaint. The demurrer is general, and simply challenges the complaint as not stating a cause of action. We have above set forth with some particularity the material facts stated in the complaint, more especially to serve the purposes of the discussion of this assignment of error. We think the complaint states a cause of action within the rule of many authorities. It alleges, it is true, an oral agreement to convey real estate; but it further alleges a complete performance of that agreement on the part of the respondent Ellen Davies, and a part performance on the part of the deceased. The face of the complaint shows that the deceased placed the said respondent in full possession under the agreement; that she fully discharged her obligations under the contract during the life time of the deceased, is still in possession thereunder, and that nothing remains undone to fully execute the contract except a formal conveyance of the legal title. This shows such a performance as takes the contract out of the statute of frauds. It shows the equitable title to rest in respondent Ellen Davies; that she is entitled to the enforcement of the oral agreement thus by her performed, and to have

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her title quieted. *McCullom v. Mackrell*, 13 S. D. 262 (83 N. W. 255); *Svanburg v. Fosseen*, 75 Minn. 350 (78 N. W. 4, 43 L. R. A. 427, 74 Am. St. Rep. 490); *Brinton v. Van Cott*, 8 Utah 480 (33 Pac. 218); *Kofka v. Rosicky*, 41 Neb. 328 (59 N. W. 788, 25 L. R. A. 207, 43 Am. St. Rep. 685); *Bryson v. McShane*, 48 W. Va. 126 (49 L. R. A. 527, 35 S. E. 848).

Many other cases are cited by respondents' counsel, but the rule is a well established one, and we will not cite other cases. The cases cited above rest upon facts similar to those of the case at bar. The facts alleged show respondent Ellen Davies entitled to some relief. Ordinarily the relief asked under such circumstances is specific performance, but, being in possession of the property, a decree quieting title is asked. The facts recited being such as bring the case within the jurisdiction of a court of equity, and that jurisdiction having attached, it extends to the whole controversy, and whatever relief the facts warrant will be granted. *Jordan v. Coulter*, 30 Wash. 116 (70 Pac. 257). A decree quieting title in this instance is in effect the equivalent of specific performance, since the action is brought by one already in possession and against the heirs of an intestate.

A number of errors are assigned upon the findings of the court. These assignments involve both the sufficiency and competency of the evidence. A controversy has arisen between counsel concerning exceptions taken by appellants to the findings of facts and conclusions of law. Respondents' counsel contend that no sufficient exceptions to the findings were taken, and for that reason a review of the findings and evidence cannot be had. At the foot of the findings, as shown by the record, appears the following:

“To each and every one of the above findings of fact the defendants in person and by their attorney duly except, and their exceptions are hereby allowed.

“Boyd J. Tallman, Judge.”

“June 5, 1902.”

A similar statement follows the conclusions of law. Respondents urge that the above portion of the record shows that appellants' counsel was present when the findings were signed, and that no other exceptions were taken. Such general exceptions have been repeatedly held by this court to be insufficient to challenge attention to any specific finding, and a review of the facts has been as repeatedly refused under such exceptions. It is our duty to follow that rule here, if such are the only exceptions in the record. Other specific exceptions, however, appear as having been filed June 12, 1902, seven days after the findings were filed. Appellants seek now by affidavit to contradict the statement in the record that they were present in person and by attorney, and took the general exceptions at the time the findings were signed. We cannot permit the record to be thus contradicted, and must decline to consider the affidavit. But with appellants present and taking the exceptions at the time as recited in the record, we know of no reason why they might not have filed more specific exceptions within five days, as provided by § 5052, Bal. Code. The exceptions were, however, not filed for seven days after the filing of the findings, but the record further shows that on the 9th day of June respondents served written notice upon appellants of the signing and filing of the findings and conclusions. The section of the statute provides, among other things, that exceptions may be taken by filing written exceptions “where the report or decision is signed subsequently to the hearing and in the absence of the party excepting, within

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five days after the service on such party of a copy of such report or decision or of written notice of the filing thereof." Appellants being present, as shown by the record, when the findings were signed, it was not mandatory that respondents should serve written notice of the signing and filing of the findings. They elected, however, to make such service, and appellants' exceptions were filed within five days thereafter. It is somewhat doubtful if, under this record and the statute, appellants are entitled to have this evidence reviewed; but in order that no injustice may be done, since respondents elected to give written notice of the signing and filing of the findings, and since because of that fact appellants seem to have acted upon the date of such service as fixing the beginning of the five-day period, we have concluded to consider the exceptions and review the statement of facts.

We have read all the evidence and examined all the exhibits. Error is assigned upon the introduction of testimony. We have held that this is not of itself sufficient to warrant a reversal of an equity cause, which is triable *de novo* in this court. *Rohrer v. Snyder*, 29 Wash. 199 (69 Pac. 748). If there is sufficient competent evidence to sustain the court's findings and judgment, this court will not reverse a cause because there may have been some incompetent evidence admitted. There is ample evidence to support the court's findings in this case. There is much conflict, to be sure, but not such as leads us to the belief that we should disturb the findings of the trial judge, who saw and heard these disputing witnesses. The main point was to determine if the alleged contract existed. If the contract actually existed, then, under the evidence, there is little room to contend that respondent Ellen Davies did not perform her part of it. As an evidence of, and as relating to, the actual contract, the original writing,

a copy of which is above set out, was introduced in evidence. This writing was not introduced as the contract itself. It is incomplete as a contract in itself, but it was properly admitted as a declaration of the deceased concerning the subject-matter of the alleged oral contract. The genuineness of the signature to that paper is disputed. An expert, by comparison, and some other witnesses who have seen the deceased write, were of the opinion that the signature is not that of the deceased. Another expert, by comparison with admitted signatures, pronounced it genuine, as did also other witnesses. Miss Rhodes, one of the subscribing witnesses to the instrument, testified that it was the signature of Lamar Cheadle, and that she saw him write it. This witness is not impeached, and, for aught that appears in the record, she is as credible as any others who testified. We have examined the signature and compared it with others admitted to be genuine. We have also examined the photographs of that and of the other signatures submitted along with other exhibits. From such examination we are led to the same conclusion as that reached by the trial court. Taking all the evidence together, unless absolute perjury was committed, the findings of the trial court were right. To have found otherwise would have practically determined that respondents and Miss Rhodes were guilty of false testimony, and that, too, in the absence of impeaching testimony; whereas the findings as made do not necessarily so involve any of the witnesses.

The judgment is affirmed.

FULLERTON, C. J., and DUNBAR, MOUNT and ANDERS, JJ., concur.

Mar. 1903.] Opinion of the Court.—FULLERTON, C. J.

[No. 4394. Decided March 4, 1903.]

N. W. PRESCOTT, *Appellant*, v. PUGET SOUND BRIDGE AND
DREDGING COMPANY, *Respondent*.

PLEADING — WAIVER OF DEMURRER — FILING AMENDED COMPLAINT.

An erroneous ruling sustaining a demurrer to a complaint is waived by the filing of an amended complaint.

SAME—SUFFICIENCY OF COMPLAINT ATTACKED ON TRIAL.

Where a complaint is attacked by an objection to the introduction of any evidence in its support, on the ground that it does not state a cause of action, the attack will be treated as an attack on a complaint after verdict, when every reasonable intendment and legitimate inference susceptible of being drawn or deduced from the facts stated is permitted in aid of the statement of the cause of action.

CONTRACT OF EMPLOYMENT — CONSTRUCTION.

A contract of employment made in the state of Washington, whereby defendant agreed to employ plaintiff at a stipulated salary, "for the time the work undertaken by the defendant at Manilla should last," was not so indefinite and uncertain, either as to the commencement or duration of service, as to render the contract void.

Appeal from Superior Court, King County.—Hon.
WILLIAM R. BELL, Judge. Reversed.

Byers & Byers, for appellant.

Ballinger, Ronald & Battle and *Thomas M. Vance*, for respondent.

The opinion of the court was delivered by

FULLERTON, C. J.—The appellant instituted this action to recover for an alleged breach of a contract of employment entered into between the appellant and respondent. To his original complaint a demurrer was interposed, which the trial court sustained. Thereupon he took leave

81	177
83	112
31	177
37	390
31	177
39	64
31	177
40	354
40	355

to amend, and thereafter filed an amended complaint. Issue of fact was joined on the amended complaint, and the cause set down for trial. At the trial the respondent objected to the introduction of any evidence on the part of the plaintiff on the ground that the amended complaint did not state facts sufficient to constitute a cause of action. This objection was sustained by the court, and the action dismissed, at the appellant's costs. It is assigned that the court erred (1) in sustaining the demurrer to the original complaint, and (2) in sustaining the objection to the introduction of evidence at the trial.

The first objection made is not open to the appellant. An erroneous ruling sustaining a demurrer to a complaint is waived by taking leave to amend, and thereafter filing an amended complaint. Such is the effect of the ruling of this court in *Bell v. Waudby*, 4 Wash. 743 (31 Pac. 18), and *Lowman v. West*, 7 Wash. 407 (35 Pac. 130); and such also is the general rule. *Ganceart v. Henry*, 98 Cal. 281 (33 Pac. 92); *Buck v. Reed*, 27 Neb. 67 (42 N. W. 894); *Hurd v. Smith*, 5 Colo. 233; *Rockwell v. Holcomb*, 3 Colo. App. 1 (31 Pac. 944); *People, for use of Kennard, v. Core*, 85 Ill. 248; *Petty v. Trustees of the Church of Christ*, 95 Ind. 278; *Rosa v. Missouri, K. & T. Ry. Co.*, 18 Kan. 124; *Clearwater v. Meredith*, 1 Wall. 25. To make the error available, the pleader must refuse to amend, and stand on his complaint, and appeal from the judgment the trial court may enter against him.

The amended complaint, omitting its formal parts, is as follows:

"Comes now the plaintiff, and by leave of court files herein his amended complaint, and for cause of action alleges:

"(1) That the defendant is a corporation, duly organized, created, and existing, under and by virtue of the laws

of the state of Washington, with its principal place of business at Seattle, Washington.

"(2) That on August 31st, 1901, the plaintiff and the defendant, through its president, C. E. Fowler, mutually agreed that the plaintiff should serve the defendant as foreman, and the defendant should employ plaintiff as foreman, for the time the work undertaken by the defendant at Manila should last; and that plaintiff, for his services, should receive the sum of one hundred and twenty-five (\$125) dollars per month while engaged as foreman, and the sum of one hundred (\$100) dollars per month while engaged in any other capacity.

"(3) That at said time the plaintiff offered to enter upon the service of the defendant, and has ever since been ready and willing so to do.

"(4) That the defendant wrongfully, and without cause, refused to permit the plaintiff to enter upon such service, to the damage of the plaintiff in the sum of four thousand five hundred (\$4,500) dollars."

The objection made to this complaint is that the contract therein set out is too indefinite and uncertain to be capable of enforcement, in that it fixes no time for the commencement of the employment and no definite time for its continuance. But before passing to the objections made, it is well to notice for a moment the rule of construction of a pleading when attacked in the manner in which the respondent sought to attack the one before us. As the question whether or not a complaint states a cause of action can, under the express provisions of the Code, be raised at any stage of the proceedings, it was permissible for the respondent to raise the question when the appellant offered evidence to sustain the allegations of his complaint. Such an objection, however, will not be treated as a demurrer to the complaint, nor as a motion to make the complaint more definite and certain, in which defective and indefinite and uncertain allegations can be urged

against its sufficiency, but will be treated as an attack on the complaint is treated after verdict; it must be found that there is an absolute failure to state a cause of action, after every reasonable intendment and legitimate inference susceptible of being drawn or deduced from the facts stated in the complaint are drawn and deduced and applied in aid thereof. In other words, there must be something more than a defective statement of a cause of action; it must appear that the cause of action attempted to be stated is in itself defective. Tested by these rules, the complaint in question is sufficient. While it may be susceptible to a motion to make more definite and certain, or insufficient as against a demurrer, it is good as against an objection to the introduction of evidence after issue joined, and the cause placed on trial on its merits. It is alleged that on August 31, 1901, the appellant and respondent mutually agreed that the appellant should serve the respondent in certain capacities at certain wages, and that the plaintiff at that time offered to enter upon the service, but that the respondent wrongfully, and without cause, refused to permit him to enter thereon. The contract was one which, if it did not give the appellant the right to enter at once into the service of the respondent, gave him the right to enter therein within a reasonable time after its execution; and was broken, within either view, when the respondent wrongfully, and without cause, refused to permit the appellant to enter into the service at all. It was not, therefore, so indefinite and uncertain as to the time of the commencement of the service as to render it void. Nor was it so indefinite and uncertain as to its duration as to render it void. While its duration was uncertain in the sense that it was not shown how long the work undertaken by the respondent at Manila would last, yet it was not a contract of employment for

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Syllabus.

an indefinite period in the sense that either party could terminate it at will. It was a contract to serve on the one part and to employ on the other, obligatory upon each until the happening of a particular event, and until that event happened neither party could terminate the contract without committing a breach thereof. A contract of hiring is not indefinite, nor terminable at will, because the precise number of days, months or years that the service is to continue, are not specified. If there is a period of time, be the same fixed or indefinite, during which neither party is at liberty to terminate the contract, then the contract is not so indefinite or uncertain as to its duration as to be incapable of enforcement. *McMullan v. Dickinson Co.*, 63 Minn. 405 (65 N. W. 661, 663); *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109 (32 N. E. 802, 51 Am. St. Rep. 289); *Carter White Lead Co. v. Kinlin*, 47 Neb. 409 (66 N. W. 536); *Carnig v. Carr*, 167 Mass. 544 (35 L. R. A. 512, 46 N. E. 117, 57 Am. St. Rep. 488).

The court erred in sustaining the objection to the introduction of evidence, and in dismissing the action. The judgment will therefore be reversed, and the cause remanded, with instructions to try the cause upon its merits.

MOUNT, ANDERS and DUNBAR, JJ., concur.

[No. 4471. Decided March 4, 1903.]

E. L. COYLE, *Respondent*, v. SEATTLE ELECTRIC COMPANY, *Appellant*.

NEW TRIAL—ORDER GRANTING CANNOT BE VACATED.

Where a court has granted a motion for a new trial, it cannot subsequently, under the belief that it committed error in so rul-

31	181
133	83
31	181
434	189
31	181
440	210

ing, set aside such order and deny the motion. (FULLERTON, C. J., dissents).

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Reversed.

Struve, Allen, Hughes & McMicken, for appellant.

Benson & Aust, for respondent.

The opinion of the court was delivered by

HADLEY, J.—Respondent brought this suit against appellant to recover damages for personal injuries alleged to have been sustained while he was a passenger upon one of appellant's cable cars running upon James street in Seattle. A trial was had before a jury, resulting in a verdict of \$3,500 in favor of respondent. Appellant interposed a motion for new trial, and the same came on regularly for hearing on the 10th day of February, 1902. After hearing the arguments of the respective counsel, the court announced that the verdict was set aside and a new trial granted. The following entry was made in the court journal of that day: No. 33,561. E. L. Coyle, plaintiff, vs. Seattle Electric Co., defendant. Defendant's motion for new trial granted. Exception allowed." On February 17, 1902, respondent served and filed what he termed a "motion for reargument and for judgment upon the verdict," whereby he moved the court "that the order heretofore made herein in open court upon the defendant's motion for new trial in this case be by the court vacated; that defendant's motion for new trial be denied, and that plaintiff have judgment in this case upon the verdict heretofore rendered herein." The last-mentioned motion was submitted upon briefs, and upon May 3, 1902, appellant's motion for new trial was overruled, and the following entry was made in the court journal of that day: "No. 33,561. E.

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L. Coyle, plaintiff, vs. Seattle Electric Co., defendant. Defendant's motion for new trial is overruled and exception allowed." On May 6, 1902, judgment was entered for the amount of the verdict, with interest and costs. The appellant has appealed from the order denying its motion for new trial, and also from the judgment.

It is assigned as error that the court denied appellant's motion for a new trial after the same motion had been granted. Subsequent to the final judgment, and pending this appeal, the respondent moved to correct the record. Appellant appeared specially, and objected to the hearing of the motion, which objections were overruled. Thereupon respondent's motion to correct the record was by the court granted, and the order thereon recites, among other things, the following:

"It is hereby ordered and adjudged that the record in the above-entitled cause, as appears by the journal entry of February 10, 1902, be corrected to read as follows: '1902. February 10, 33,561, E. L. Coyle vs. Seattle Electric Company. Defendant's motion for new trial granted. Exception allowed. On this 10th day of February, 1902, after the court has granted defendant's motion for a new trial and before any record other than the clerk's minute entry thereof has been made, the court having reason to believe that its ruling upon said motion is erroneous, upon its own motion, but upon the *ex parte* application of counsel for plaintiff, grants plaintiff leave to file a motion for a reargument of defendant's motion for a new trial, and the above-entitled cause is hereby continued for the purpose of giving plaintiff a reasonable time to file said motion for re-argument and for hearing thereon. Let counsel for defendant be informed of this proceeding.' Done in open court this 11th day of October, 1902, as of the 10th day of February, 1902."

Respondent calls our attention to a rule prevalent in many states where terms of courts are defined by statute.

The rule is succinctly stated as follows in 17 Am. & Eng. Enc. Law (2d ed.), §13:

“Every court has absolute control over its own judgments and decrees during the term at which they were rendered, and may therefore, at any time before the expiration of the term, in the exercise of its discretion, open, amend, correct, revise, vacate, or supplement any judgment or decree rendered during such term.”

Our superior courts have not terms fixed by statute, but are courts of continuous session. Courts of continuous session are not general in the states. In Kentucky the Kenton circuit court is a court of continuous session, and is by statute given “control over its judgments for sixty days as circuit courts have over their judgments during the term in which they are rendered.” *Schlusser v. Murnan* (Ky), 49 S. W. 421. In this state no such extension of control is granted by statute. But respondent reasons that, since the term rule prevails in so many states, in the absence of such terms the proper rule in this state should be held to be that the court retains control over its own orders and judgments at all times until the final judgment has been entered in the cause. California is a state having a system similar to ours. By statute the courts are declared to be “always open,” and yet the supreme court of that state seems to have uniformly held that, when an order or judgment upon a motion for new trial has been made or rendered, it cannot be set aside by the court which rendered it for mere error, and can only be corrected by appeal. Whatever might be said of this as an original question in this state, we cannot treat it as such without squarely overruling a former decision of this court. In *Burnham v. Spokane*, 18 Wash. 207 (51 Pac. 363), this court followed the California rule, and quoted with approval from California cases bearing directly upon

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the point presented here. Cases from Nevada and Oklahoma are also cited to sustain that opinion, and they seem to be in point. In that case a retiring judge had denied a motion for new trial, and his successor vacated that order and granted a new trial. It was said in the opinion, after a review of authorities, that the retiring judge himself would not have had authority to set aside his judgment refusing a new trial, and that the authority of his successor was certainly no more extensive. It was urged in that case, as it is here, that the rule adopted in *Clein v. Wandschneider*, 14 Wash. 257 (44 Pac. 272), should be followed. In the last-named case the court went back to the original entry to determine if a wrong was committed in the first instance. But the court observed in *Burnham v. Spokane*, *supra*, that the former case came squarely within the provisions of § 4953, Ballinger's Code, providing for relief in case of mistake, inadvertence, surprise, or excusable neglect, and refused to follow it where the action of the court below was merely to pass upon a question of error. The statute provides that the trial court may vacate its judgments and orders for the reasons above enumerated, but there is no statute authorizing a trial court to review and vacate its judgments for what it may deem to be mere error. In the case at bar it is not contended that there existed any mistake, inadvertence, surprise, or excusable neglect. The *nunc pro tunc* entry made by the court, above set forth affirmatively, shows the action of the court to have been based upon the belief that its first ruling upon the motion for new trial was erroneous. The first order entered upon the motion for new trial was a judgment; not the final judgment in the case, to be sure, but it was final upon that subject, was appealable under the statute, and under *Burnham v. Spokane*, *supra*, could only be corrected for mere error by appeal. That case must be decisive of

this one, and it must be held that it was error to enter the last judgment upon the motion for new trial.

The judgment is therefore reversed, and the cause remanded with instructions to the lower court to continue with the new trial as provided by its first order upon the motion for new trial.

MOUNT, DUNBAR and ANDERS, JJ., concur.

FULLERTON, J. (dissenting).—It is held in this case, if I understand the opinion, that error in a ruling made upon a motion for a new trial cannot be corrected by the trial court which made it, but must be carried into and perpetuated in the judgment, and corrected, if corrected at all, by appeal. I cannot assent to this conclusion. I understand that a trial court has plenary powers over a cause pending before it until the entry of judgment therein; that it may, before the entry of judgment, correct any error theretofore committed by it in the course of the proceedings, even though it be required, in order to do so, to go back to the first ruling made in the cause. Stated in another way, no court is bound to enter a void or an erroneous judgment. The conclusion reached by the majority, it seems to me, violates this rule. I am aware that the order granting the motion for a new trial is treated as a judgment, and language is found in the statute which seems to show a want of power in a trial court to correct its judgments for mere error. This, I think, is founded on a misapprehension of the statute. An order granting a new trial is not a judgment as that term is defined in the Code. A judgment is the final determination of the rights of the parties in the action. All rulings made in the course of the proceedings leading up to the judgment are orders. Ballinger's Code, §§ 5080, 5080a. When the Code speaks of judgments, therefore, it means what it has defined to be such, not

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what it has denominated "orders." Again, it is said that the case of *Burnham v. Spokane Mercantile Co.*, 18 Wash. 207 (51 Pac. 363), maintains the conclusion reached. I do not so read the case, but, if it does, it should not be followed.

31	187
d41	374

[No. 4573. Decided March 4, 1903.]

PROSPECTORS' DEVELOPMENT COMPANY, *Respondent*, v.
GEO. BROOK *et al.*, *Appellants*.

APPEAL — STATEMENT OF FACTS — PLACE OF CERTIFICATION.

Under Laws 1901, p. 76, § 1, which provides that a superior judge shall not be authorized to hear any matter outside of the county wherein the cause is pending, except by consent of the parties, it was error for the court to adjourn the settlement of a statement of facts to a county other than the one of trial, when the respondent had not consented thereto.

SAME — VOID CERTIFICATION — NEW NOTICE.

Under Bal. Code, § 5058, which provides that if the judge is absent at the time named in a notice or fixed by adjournment for the settlement and certification of a statement of facts, a new notice may be served, the failure of the judge to legally certify a statement duly filed in his court, because of the adjournment of the proceedings to a place outside of the county of trial, would not preclude the subsequent settlement and certification of the statement under a new notice.

Appeal from Superior Court, Okanogan County.—Hon. CHARLES H. NEAL, Judge. Motion to return statement of facts to superior court for certification granted.

Happy & Hindman, for appellants.

Edward W. Taylor for respondent.

The opinion of the court was delivered by

HADLEY, J.—Appellants move in this court for an order

that respondent show cause why the statement of facts on file in this court shall not be sent back to the superior court of Okanogan county to be recertified by the judge before whom the cause was tried; or, in the alternative, that said statement shall stand as the statement of facts upon which the cause shall be heard in this court. The motion was supported by affidavit to the effect that notice was regularly served upon respondent's counsel for the settlement and certification of the statement of facts, the date fixed being December 15, 1902. Thereupon respondent's counsel informed appellants' counsel that he could not, because of other court engagements, be present on the date fixed; that thereafter, for the purpose of accommodating respondent's counsel, and for the accommodation of the judge before whom the cause was tried, appellants obtained an adjournment of the hearing upon the application to have the statement certified, and obtained an order of the court fixing December 27, 1902, as the date for such adjourned hearing, which also designated Spokane, Washington, as the place for said hearing, and that such order was served upon respondent's counsel; that respondent served and filed an amended statement of facts, which was practically adopted in its entirety by the court; that, by reason of the foregoing, appellant's counsel did not think respondent's counsel desired to be present at the time the statement was certified, and at the time and place mentioned in the order of adjournment the judge settled and certified the statement; that, by mistake, the order of adjournment was entitled as having been entered in the superior court of Okanogan county, but that the place designated for the adjournment was not designated as being other than the city of Spokane.

Upon the motion and affidavit, as substantially above set forth, an order to show cause was issued, and at the

hearing the facts stated in the affidavit were not controverted. In the oral argument it was suggested that the statement be ordered returned to the superior court of Okanogan county in order that the court may correct the error as to venue in the order of adjournment and re-certify the statement of facts. As far as the correction of the order is concerned, the fact is not controverted that it was actually entered in the superior court of Okanogan county, and, if no other difficulty were in the way, we should regard that as a mere clerical omission, and treat it as corrected here. Should we do so, however, the statement would be left without proper settlement or certification by the trial court. The affidavit, as we have seen, shows affirmatively that the place of the attempted settlement and certification was in Spokane county—a county other than that in which the cause was pending. It does not appear that respondent consented to the hearing being held in Spokane. Under these circumstances, we think the judge was not empowered to settle and certify the statement at the place mentioned. Section 1 of chapter 57, page 76, Session Laws of 1901, after reciting that a judge may within any county in his district do certain things in relation to causes pending in other counties of his district, concludes as follows: "*Provided*, That nothing herein contained shall authorize the judge to hear any matter outside of the county wherein the cause or proceeding is pending, except by consent of the parties." The language of § 5058, Bal. Code, seems to indicate that the court is at liberty to designate any place in an adjourning order for settlement of a statement of facts, but the above statute of 1901, as the later statute, has certainly nullified that portion of the former statute. As already suggested, we cannot therefore adopt the alternative presented by the motion and treat this as a statement of facts

in the case, because it is made clearly to appear that it was never legally certified.

Respondent suggests in argument that it is useless to send the statement back for settlement and certification, for the reason that it must ultimately be stricken for reasons mentioned in the argument. That question is not, however, now before us. We are only confronted with the right of appellants to have the statement settled and certified. After a statement is filed in the superior court there seems to be no limitation as to time when it may be certified. "If the judge is absent at the time named in a notice or fixed by adjournment, a new notice may be served." Bal. Code, § 5058. Manifestly the judge was absent in this instance. An order of adjournment regularly entered fixed a *date* for the settlement, and the *place* was properly in Okanogan county, unless respondent had otherwise consented. But the record shows that on that date the judge was in Spokane county—the place where he attempted to settle and certify the statement. We therefore think the statement may yet be certified after a new notice, as provided by law. It must be clearly understood, however, that we do not now pass upon any question that may arise in connection with the statement, except appellants' right to have it settled and certified.

Appellants ask that, in the event the statement shall be returned, an extension of time be granted for filing additional or supplemental briefs. We shall not make any order upon that subject. Under the rule permitting the filing of additional authorities, we are unable to see how any hardship may result to the prejudice of either party.

For the reasons above stated, it is ordered that the statement of facts be returned to the superior court of Okanogan county for the purposes herein indicated.

FULLERTON, C. J., and MOUNT, ANDERS and DUNBAR, JJ., concur.

[No. 4384. Decided March 5, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. RICHARD
SHARPLESS, *Appellant*.

BARBERS — REGULATION AND LICENSING OF OCCUPATION — STATUTES
— TITLE OF ACT.

The title of an act reciting that it is "an act to regulate the practice of barbering and licensing of persons to carry on such practice, and providing punishment for its violation," is broad enough to embrace provisions in the act for the appointment of a board of examiners, and their duties and compensation, for the regulation of apprentices, and for the payment of license fees.

SAME — CONSTITUTIONAL LAW — LOCAL AND CLASS LEGISLATION.

The act to regulate barbering (Laws 1901, p. 349) is not void on the ground of being local, class, and special legislation because of the fact that it divides the communities of the state into classes, for which different regulations are provided, when the law is made to operate equally upon all barbers within the respective classifications.

SAME.

The fact that a law provides for the issuance of a certificate without examination, upon the payment of one dollar, to all barbers carrying on their occupation in cities of the first, second and third classes at the time the act took effect, while barbers subsequently coming into those cities would be required to stand examination and pay five dollars for a certificate, would not render the act void as discriminating against one class of citizens in favor of others, since the law operates equally upon all who fall under its operation.

SAME — APPLICATION OF ACT.

An act making it "unlawful for any person to follow the occupation of barber in any incorporated city or town in this state," under certain conditions, is not restricted in its application to such municipalities only as were incorporated at the time of its passage.

STATUTES — REASON FOR ENACTMENT — PROVINCE OF LEGISLATURE.

Courts will not pass upon the sufficiency of the reason for the enactment of a law, which is not in conflict with some constitutional provision.

31	191
34	84
34	108
31	191
d30	180
31	191
42	242

ing, set aside such order and deny the motion. (FULLERTON, C. J., dissents).

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Reversed.

Struve, Allen, Hughes & McMicken, for appellant.

Benson & Aust, for respondent.

The opinion of the court was delivered by

HADLEY, J.—Respondent brought this suit against appellant to recover damages for personal injuries alleged to have been sustained while he was a passenger upon one of appellant's cable cars running upon James street in Seattle. A trial was had before a jury, resulting in a verdict of \$3,500 in favor of respondent. Appellant interposed a motion for new trial, and the same came on regularly for hearing on the 10th day of February, 1902. After hearing the arguments of the respective counsel, the court announced that the verdict was set aside and a new trial granted. The following entry was made in the court journal of that day: No. 33,561. E. L. Coyle, plaintiff, vs. Seattle Electric Co., defendant. Defendant's motion for new trial granted. Exception allowed." On February 17, 1902, respondent served and filed what he termed a "motion for reargument and for judgment upon the verdict," whereby he moved the court "that the order heretofore made herein in open court upon the defendant's motion for new trial in this case be by the court vacated; that defendant's motion for new trial be denied, and that plaintiff have judgment in this case upon the verdict heretofore rendered herein." The last-mentioned motion was submitted upon briefs, and upon May 3, 1902, appellant's motion for new trial was overruled, and the following entry was made in the court journal of that day: "No. 33,561. E.

Mar. 1903.] Opinion of the Court.—HADLEY, J.

L. Coyle, plaintiff, vs. Seattle Electric Co., defendant. Defendant's motion for new trial is overruled and exception allowed." On May 8, 1902, judgment was entered for the amount of the verdict, with interest and costs. The appellant has appealed from the order denying its motion for new trial, and also from the judgment.

It is assigned as error that the court denied appellant's motion for a new trial after the same motion had been granted. Subsequent to the final judgment, and pending this appeal, the respondent moved to correct the record. Appellant appeared specially, and objected to the hearing of the motion, which objections were overruled. Thereupon respondent's motion to correct the record was by the court granted, and the order thereon recites, among other things, the following:

"It is hereby ordered and adjudged that the record in the above-entitled cause, as appears by the journal entry of February 10, 1902, be corrected to read as follows: '1902. February 10, 33,561, E. L. Coyle vs. Seattle Electric Company. Defendant's motion for new trial granted. Exception allowed. On this 10th day of February, 1902, after the court has granted defendant's motion for a new trial and before any record other than the clerk's minute entry thereof has been made, the court having reason to believe that its ruling upon said motion is erroneous, upon its own motion, but upon the *ex parte* application of counsel for plaintiff, grants plaintiff leave to file a motion for a reargument of defendant's motion for a new trial, and the above-entitled cause is hereby continued for the purpose of giving plaintiff a reasonable time to file said motion for re-argument and for hearing thereon. Let counsel for defendant be informed of this proceeding.' Done in open court this 11th day of October, 1902, as of the 10th day of February, 1902."

Respondent calls our attention to a rule prevalent in many states where terms of courts are defined by statute.

call attention to the subject-matter of the act, and the act itself must be looked to for a full description of the powers conferred.' *Lancey v. King County*, 15 Wash. 9 (45 Pac. 645, 34 L. R. A. 817)."

See, also, *Hathaway v. McDonald*, 27 Wash. 659 (68 Pac. 376). Under the rule therein announced, the title of the act in question here is sufficient.

2. It is next argued that the act is void because "local, class, special and discriminating legislation"; local, because it applies only to incorporated cities and towns, and special and discriminating, because it does not affect all barbers alike. The act provides as follows:

"Section 1. It shall be unlawful for any person to follow the occupation of barber in any incorporated city or town in this state, unless he shall have first obtained a certificate of registration as provided in this act: *Provided, however,* That nothing in this act shall apply to or affect any person who is now engaged in such occupation except as hereinafter provided."

"Sec. 9. Every person now engaged in the occupation of barber in cities of the first, second or third class in this state shall within ninety days after the approval of this act file with the secretary of said board an affidavit setting forth his name, residence and length of time during which and the places where he has practiced such occupation, and shall pay to the secretary of said board one dollar, and a certificate entitling him to practice said occupation for one year shall thereupon be issued to him.

"Sec. 10. To obtain a certificate of registration under this act, any person excepting those mentioned in section nine shall make application to said board, and shall pay to the secretary an examination fee of five dollars, and shall present himself at the meeting of the board for examination of applicants. The board shall examine such person, and being satisfied that he is above the age of eighteen years, of good moral character, free from contagious or infectious disease, has studied the trade for two years as

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an apprentice under or as a qualified and practicing barber in this state, or other states, and is possessed of the requisite skill to properly perform all the duties, including his ability in the preparation of the tools used, shaving, cutting of the hair and beard and all the various services incident thereto, and has sufficient knowledge concerning the common diseases of the face and skin to avoid the aggravation and spreading thereof in the practice of his trade, his name shall be entered by the board in a register hereinafter provided for and a certificate of registration shall be issued to him authorizing him to practice said trade in this state, for one year. All certificates shall be renewed each year, for which renewal a fee of fifty cents shall be paid. All persons making application for examination under the provisions of this act shall be allowed to practice the occupation of barber until the next meeting as designated by said board."

"Sec. 15. Any person practicing the occupation of barber in any city of the first, second or third class in this state, without first having obtained a certificate of registration as provided in this act, or falsely pretending to be practicing such occupation under this act, or who uses, or allows towels to be used on more than one person before such towels have been laundered; or razors, lather, or hair brushes on more than one person before the same shall have been sterilized or in violation of any of the provisions of this act, and every proprietor of a barber shop who shall wilfully employ a barber who has not such a certificate shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than ten dollars nor more than one hundred dollars, or by imprisonment in the county jail not less than ten days nor more than ninety days, or both."

The right of the legislature to enact laws for the promotion of health is now universally sustained as a police regulation. Cooley, *Constitutional Limitations* (6th ed.), p. 720; *Fox v. Territory*, 2 Wash. T. 297 (5 Pac. 603); *State v. Carey*, 4 Wash. 424 (30 Pac. 729); *Hathaway v.*

McDonald, supra; *State v. Zeno*, 79 Minn. 80 (48 L. R. A. 88, 81 N. W. 748, 79 Am. St. Rep. 422); *Ex parte Lucas*, 160 Mo. 218 (61 S. W. 218); *State v. Wilcox*, 64 Kan. 789 (68 Pac. 634). Under this rule the legislature of this state has enacted laws for the regulation of the occupations of physicians, dentists, pharmacy, and other occupations.

It is also well settled in this state that when a law operates equally upon all who fall under its operation, even though they constitute a class, the law is upheld. *Fox v. Territory, supra*; *State v. Carey, supra*; *Fitch v. Applegate*, 24 Wash. 25 (64 Pac. 147); *Redford v. Spokane Street Ry. Co.*, 15 Wash. 419 (46 Pac. 650); *State v. Considine*, 16 Wash. 358 (47 Pac. 755); *McDaniels v. J. J. Connelly Shoe Co.*, 30 Wash. 549 (71 Pac. 37); *State v. Nichols*, 28 Wash. 628 (69 Pac. 372). Mr. Cooley, in his work on Constitutional Limitations (6th ed.), p. 480, says:

“The authority that legislates for the state at large must determine whether particular rules shall extend to the whole state and all its citizens, or, on the other hand, to a subdivision of the state or a single class of its citizens only. The circumstances of a particular locality, or the prevailing public sentiment in that section of the state, may require or make acceptable different police regulations from those demanded in another, or call for different taxation, and a different application of the public moneys. The legislature may therefore prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the state constitution does not forbid. These discriminations are made constantly; and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle. The legislature may also deem it desirable

to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties, and capacities of citizens."

The act under consideration in effect classifies the state into three districts: (1) All cities of the first, second, and third classes; (2) all other incorporated cities and towns; (3) all towns or places not incorporated. All barbers conducting their occupation in the latter class are exempted from the provisions of the act. All barbers in the second class, except those engaged at the time the act took effect, must pass an examination and pay \$5 for a certificate. All in the first class at the time the law took effect were entitled to a certificate authorizing them to continue the practice of their occupations upon filing an affidavit and paying one dollar therefor. All thereafter within the first and second classes, desiring to barber, must pass an examination and pay a fee of \$5. All barbers in the first class are subject also to certain restrictions as follows: They must not use the same towel on two different persons without having the same laundered. They must sterilize their tools before using them the second time, etc. Barbers as a class throughout the state are undoubtedly subject to different rules and restrictions under this act, but these restrictions depend upon the district in which they carry on their occupation. All who carry on their occupation in the same district are subject to the same laws and are treated alike. No privilege or immunity is granted to one which upon the same terms does not belong equally to all. Barbers as a class have no greater rights or privileges under the constitution than citizens as a class. If citizens may be classified into districts, and different regulations applied to citizens residing in one district from those residing in another, it certainly follows that a class of citizens such as barbers residing in one district may be governed by regulations different from

those governing barbers residing in another district. It cannot be doubted that the legislature may authorize by general act all cities of the first, second, and third classes, and all incorporated towns within the state, to regulate the occupation of barbering therein, or regulate any occupation affecting the health and morals of the community; that any such cities of the first class under such authority might properly pass an ordinance regulating the occupations. Cities of the second and third classes or incorporated towns under such authority might also each pass similar acts, but with different requirements and different charges for licenses, and no one would argue that, because a license sufficient for the costs of maintaining the regulation, requiring them to pass an examination before a qualified board before they are permitted to practice their occupation, and requiring them to sterilize their towels and tools before using them, and other reasonable regulation of barbers, making the same requirements apply to all barbers within the city limits, requiring them to pay the requirements in different cities were different, or the fees for licenses were different in different towns, or because certain towns had not regulated the occupation at all, the act was inimical to the constitutional provisions under discussion, for the reason that all barbers throughout the state were not placed upon the same terms. If the state may authorize cities and towns to make these regulations, the state may make them in the first instance, because cities and incorporated towns of the state are creatures of the state, and may be regulated by general law as well as by ordinance. For these reasons, we think the act is not repugnant to § 12 of art. 1 of the Constitution of this state, nor to the Fourteenth amendment to the Constitution of the United States. See *Missouri v. Lewis*, 101 U. S. 22; *Ex parte Lucas*, *supra*; *State v.*

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Zeno, supra; *State v. Bair*, 112 Iowa, 466 (81 N. W. 532; 51 L. R. A. 776); *State v. Creditor*, 44 Kan. 565 (24 Pac. 346, 21 Am. St. Rep. 306).

Two cases from the state of New Hampshire are cited and relied upon by appellant, viz.: *State v. Pennoyer*, 65 N. H. 118 (18 Atl. 878, 5 L. R. A. 709), and *State v. Hinman*, 65 N. H. 103 (18 Atl. 194, 23 Am. St. Rep. 22). These two cases arose under the same act. One related to the practice of dentistry, and the other to the practice of medicine. The act under which the cases were prosecuted provided that physicians and dentists "who have resided and practiced their professions in the city or town of their present residence during all the time since January 1, 1875," were not subject to the provisions of the act requiring a license. All others were required to take a license. Those having a diploma were required to pay one dollar; those taking an examination, five dollars. The act divided residents of the same town into two classes: "1. Those who have, and, 2, those who have not resided continuously in some one town of the state during the four years begun January 1, 1875. The latter class must, while the former need not, pay five dollars or one dollar as the case may be, for a license, in order to continue their business." And it was held in those cases that this was a discrimination between physicians, and also between dentists residing in the same town and similarly situated at the time the act took effect. These cases are criticized in *State v. Bair, supra*, but if the New Hampshire cases are correct they are not authority for appellant in this case, because the act under consideration here makes no such discrimination as was made by the New Hampshire law. All barbers in the same districts in this state at the time the act took effect are treated exactly alike under the act. But the New Hampshire court, in *State v. Pennoyer*, said:

"If all physicians alike, as well those who have as those who have not resided and practiced during the specified period in a single town, were required to procure and pay for a license, it may be that the statute would be open to no constitutional objection. *State v. Green*, 112 Ind. 462; *State v. Dent*, 25 W. Va. 1,"

thereby noting the distinction between those cases and the one at bar.

It is also argued that the act discriminates against appellant because it provides that all barbers carrying on their occupation in cities of the first, second, and third classes at the time the act took effect are not required to pass an examination; but each may instead file an affidavit within ninety days, setting forth his residence, occupation, and pay one dollar, when a certificate shall be issued to him; while those coming to such cities thereafter are required to pass an examination and pay five dollars for a certificate. This contention was decided against the position of appellant by the territorial court in *Fox v. Territory*, 2 Wash. T. 297 (5 Pac. 603). We are satisfied with the rule there announced.

It is also argued that the act applies only to cities of the state incorporated at the time of the passage of the act, and will not apply to those hereafter to be incorporated. We find no reason for this contention. The act clearly applies to all incorporated cities and towns, whether incorporated now or hereafter. *Ex parte Lucas*, *supra*.

Other questions, going more to the wisdom of the act, are presented by appellant, but these questions are for the legislature and not for the court. For example, it is urged that the act is for the protection of the health of the people of the state; that the people outside of cities and incorporated towns are as much entitled to be treated by quali-

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fied and cleanly barbers as those people who live in incorporated cities and towns; that there is no good reason why barbers in an incorporated city or town below the third class should be exempted from the provisions of the act, and be permitted to continue their occupation, while those in cities of the first, second, and third classes at the time the act went into effect should be required to file an affidavit and obtain a license before being permitted to continue their occupation; and also that barbers in cities of the first, second, and third classes are liable to a fine for failure to use clean linen or sterilize their tools, while barbers outside of such cities may use dirty linen and unsterilized tools. These and similar questions are all questions for the legislature to pass upon. There may be some good reason why barbers in larger cities should be more careful and cleanly than barbers in smaller places, and why barbers becoming such subsequent to the passage of the act should pass an examination before being permitted to practice their occupation, while those engaged at the time of the passage of the act should not, and why the fee for a license in one place may be higher than in another. Courts will not pass upon the sufficiency of the reason for the provisions of an act which is not in conflict with some constitutional provision. Cooley, in his work on Constitutional Limitations (6th ed.), 201, states the rule as follows:

“The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason, and expediency, with the law making power.”

We think the act in question is not repugnant to any provisions of the Constitution of this state or of the United States.

The judgment is therefore affirmed.

FULLERTON, C. J., and DUNBAR and ANDERS, JJ.,
concur.

31	202
31	206
31	202
34	122
31	202
36	657
31	202
38	211

[No. 4500. Decided March 5, 1903.]

WALTER A. KEENE, *Respondent*, v. CITY OF SEATTLE,
Appellant.

TAXATION — DELINQUENCY CERTIFICATE — PRIORITY OF LIEN OVER
STREET ASSESSMENT.

The holder of a general tax delinquency certificate is entitled to enforce same by foreclosure, without being compelled to pay or tender the delinquent street assessments which may be an existing lien upon the lands included in his certificate.

SAME.

Laws 1893, p. 169, § 8, allowing cities of the first class to collect street assessments according to the method of collection of general taxes, and authorizing the same procedure as if such assessments were part of the general tax assessed against such property, does not place the lien for such assessments on an equality with the general tax lien, in the absence of an express provision to that effect and in view of the evident policy of the law in favor of the priority of general tax liens.

Appeal from Superior Court, King County.—Hon.
ARTHUR E. GRIFFIN, Judge. Affirmed.

John W. Pratt and *C. A. Riddle* (*Mitchell Gilliam*, for counsel, for appellant.

William Martin, *W. A. Keene* and *McClure & McClure*,
for respondent.

Mar. 1903.] Opinion of the Court.—HADLEY, J.

The opinion of the court was delivered by

HADLEY, J.—On March 29, 1902, respondent tendered to the county treasurer of King county the amount then due and delinquent for state and county taxes for the year 1896 and subsequent years, upon certain real estate in said county, and demanded the issuance to him of certificates of delinquency. The certificates were issued. Respondent then brought this action to foreclose, based upon said certificates. The city of Seattle was made a party defendant by reason of asserting claims against the property in the way of liens for street assessments. The city answered, setting up the facts upon which the assessment liens are based, and prayed judgment that respondent be required to pay each of the assessments, together with accumulated penalties and interest thereon, as a condition precedent to a decree in his favor, and that for his failure so to do the action be dismissed. Respondent demurred to the answer, which demurrer was sustained. Judgment was thereupon rendered in favor of respondent. The city has appealed.

The principal questions presented by this appeal were decided in favor of respondent's contention in *McMillan v. Tacoma*, 26 Wash. 358 (67 Pac. 68). It was there decided that the holder of a general tax delinquency certificate is not required to pay delinquent street assessments which may be a lien upon real estate before he is entitled to receive a certificate of delinquency for general taxes paid by him upon the same lands. It is unnecessary to repeat here the argument used in that case. The statutes were there discussed, showing that it has been the evident policy of the legislature of this state to make the lien for general taxes paramount over every other claim or burden that can attach to lands, and that in the nature

of things such a course is not only wise, but necessary. We said in that opinion:

“This policy of the legislature is not only wise, but, in the nature of things, is necessary, in order that the existence and continuation of government may not be imperiled. The state and its subordinate municipalities cannot exist without the collection of public revenue, and serious confusion would result if the lien of taxes levied for that purpose should be made inferior to, or equal with, local assessments or other liens.”

In view of our interpretation of the revenue laws in the above-mentioned case, we shall decline to hold that street assessments are of equal rank with general taxes as liens upon real property, unless we are shown a statutory declaration that is so direct that no doubt can arise that such is the legislative intent.

It is urged, however, by appellant, that the case at bar should be distinguished from *McMillan v. Tacoma*, *supra*, for the reason that the city of Seattle was acting under the provisions of a permissive statute which the city of Tacoma had not adopted as a part of its procedure. The statute referred to is found in chapter 71, page 167, of the Session Laws of 1893. Section 8 of said act is as follows:

“The assessment roll of the county made as herein provided shall be deemed and held to be also the assessment roll of any city of the first class therein, and in cases where the charter of any such city requires delinquent assessments for local improvements, or any special taxes or assessments whatever to be entered on the annual tax roll of such city, the city treasurer shall from time to time certify the same, together with the accumulated penalties and interest thereon, to the county treasurer, who shall enter the same on the general county assessment roll against the property so taxed or assessed in a separate column head, ‘Delinquent local assessments, city of,’ in the manner directed by such charter, and the same shall be

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a part of the tax due on such property and with interest shall be collected as other taxes, separate account being kept thereof, and if not paid within the time fixed for the payment of other taxes, shall be collected as other taxes are collected, together with the additional charges, penalties and interests authorized to be charged and collected, on other delinquent taxes; and all other proceedings shall be taken thereon as if the same were originally a part of the general tax assessed against such property."

It is argued by appellant that the provisions of the above section, permitting cities of the first class to adopt the method of general tax collecting as that of collecting special assessments, have the effect to place special assessments for local improvements upon an equality with general taxes. Emphasis is placed by appellant upon the words, "and the same shall be a part of the tax due on such property and with interest shall be collected as other taxes, . . . and all other proceedings shall be taken thereon as if the same were originally a part of the general tax assessed against such property." We think a fair interpretation of the language last quoted, and of the whole section, is that it relates to the method of collection which the city may adopt if it shall choose to do so. It is not stated that the lien for local assessments shall be of equal rank with the general tax lien, and, when construed with other statutory provisions relating to priority of the general tax lien, as reviewed in *McMillan v. Tacoma*, *supra*, we think it cannot be held that such was intended, and especially so in the absence of a specific statement to that effect. The intention of the legislature seems to have been to provide that cities of the first class may, if they choose, collect local improvement taxes in the same manner as if they were originally a part of the general tax, and may add thereto the same charges, penalties, and interest which are added to general taxes. The county treasurer shall

keep a separate account of the local improvement taxes so collected, thus segregating them from general taxes, evidently for the convenience of the city, that it may thereby be advised of the amount of money belonging to a special fund. The whole plan seems to have been intended as merely a convenient method of collection, whereby the city may act through the county treasurer, and through the system provided by law for his use, and thus avoid the operation of any collection machinery of its own. The method may be a desirable one for cities of the first class to adopt, and no reason is made to appear why it may not be pursued if the paramount lien of the general tax is preserved. We see no reason why certificates of delinquency may not issue under that statute for local improvement taxes and be foreclosed in the same manner as in the case of general taxes, provided they are at all stages of the proceedings treated as junior in rank to the general taxes. The latest legislative declaration upon the subject of the relative rank of the general tax lien and that for a local assessment is found in § 1, ch. 118, p. 240, Session Laws of 1901. The subject of that act relates to the levy and collection of special assessments for local improvements in cities of the first class. With reference to the lien of special assessments the section cited concludes as follows:

“Said lien shall be paramount and superior to any other lien or incumbrance whatsoever theretofore or thereafter created, except a lien for assessments for general taxes.”

This seems not to have been mentioned in *McMillan v. Tacoma*, possibly due to the fact that the briefs may have been prepared before the statute was in force. This same act of 1901, in § 5 thereof, also provides that the county treasurer shall collect delinquent assessments if the city shall so provide by charter or ordinance. We are convinced

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that we have not mistaken the legislative intention upon this subject.

The judgment is affirmed.

FULLERTON, C. J., and DUNBAR, MOUNT and ANDERS, JJ., concur.

[No. 4480. Decided March 5, 1903.]

THE STATE OF WASHINGTON, *on the Relation of L. H. Craver, Respondent*, v. J. W. McCONNAUGHEY, *Treasurer of King County, Appellant*.

TAXATION — DELINQUENCY CERTIFICATE — TENDER OF STREET ASSESSMENT UNNECESSARY.

An applicant for a general tax delinquency certificate is not required to pay the delinquent street assessments as well as the general taxes constituting liens on the real estate, in order to entitle him to a certificate of delinquency for general taxes thereon.

Appeal from Superior Court, King County.—Hon. BOYD J. TALIMAN, Judge. Affirmed.

John W. Pratt and *C. A. Riddle* (*Walter S. Fulton*, of counsel, for appellant.

Horace A. Wilson, for respondent.

PER CURIAM.—On August 11, 1902, respondent tendered to appellant, as treasurer of King county, the amount of general taxes, with interest and penalties due and delinquent upon certain real estate, and demanded the issuance to him of a certificate of delinquency, which demand appellant refused. Respondent then brought this action and sought a writ of mandate to compel the issuance of such a certificate. An alternative writ was issued.

81	207
84	122
81	207
86	667
31	207
38	211

Appellant admitted the tender, but affirmatively answered that a certain assessment for a local improvement, which was a lien upon said property, was delinquent and unpaid, and averred that respondent refused to pay said local assessment. It was appellant's defense that respondent should pay this local assessment as a condition precedent to the issuance of a certificate of delinquency for the general taxes. This defense was overruled by the court, and judgment directing the issuance of a peremptory writ of mandate was entered, from which judgment this appeal was taken. On the authority of *McMillan v. Tacoma*, 26 Wash. 358 (67 Pac. 68), and of *Keene v. Seattle*, ante, p. 202 (71 Pac. 769), the judgment is affirmed.

31 208.
34 182

[No. 4506. Decided March 5, 1903.]

ROYAL C. NELSON, *Respondent*, v. F. McLELLAN, *Appellant*.

NEGLIGENCE—DEPOSIT OF EXPLOSIVES ON VACANT LOT—INJURY TO CHILDREN.

The placing of sticks of dynamite in a box upon vacant city lots upon which children are accustomed to play constitutes negligence, where the box is partially buried out of sight, but sufficiently exposed to be an object of attraction to children, to whom its contents are accessible by reason of deficient covering.

INSTRUCTIONS—WEIGHT OF EXPERT EVIDENCE.

Expert testimony, being competent testimony under the law, must go to the jury as any other testimony in the case, and it is error for the court to discriminate in any way against its weight in instructing the jury.

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Reversed.

Roberts & Leehey, for appellant.

Preston, Carr & Gilman and *J. W. Rayburn*, for respondent.

Mar. 1903.]

Opinion of the Court.—DUNBAR, J.

The opinion of the court was delivered by

DUNBAR, J.—The respondent, in company with another boy, was playing on some vacant lots in the city of Seattle, and, observing a box which was not altogether covered, investigated the same, and found in it some sticks of explosive powder known as “Judson dynamite No. 2.” According to the testimony of the boys, these sticks of dynamite were already prepared for explosion. They took one of them (thinking it was a large fire-cracker, it being about six inches long) to a stump, lit a match, and applied it to the fuse. The dynamite exploded, and the respondent was injured thereby, losing one of his eyes. The dynamite was exploded by the boy who was playing with the respondent. It was on the Fourth of July, and they were out on the lots aforesaid exploding fire-crackers. Action was brought for damages, and a judgment of \$3,000 obtained. From such judgment this appeal is taken.

The complaint alleges, among other things, that the defendant was under contract with the city of Seattle to improve Denny way, and other ways, avenues, and streets of the city; that, while engaged in the prosecution of the work, he used an explosive powder known as “Judson dynamite No. 2” (setting forth the character of the powder, and the care and skill necessary to handle it); that, without the knowledge or consent of the plaintiff or the parents of the plaintiff, and without leave or license from the owner of the premises on which the powder was stored, he wrongfully, carelessly, negligently, and improperly did store more than twenty sticks of said powder, and did suffer it to be and remain, on said premises on the fourth day of July, 1899, badly, insufficiently, and deficiently covered, and in such position as to be readily discovered and easily tampered with by children playing upon or passing

over said lot; that the plaintiff and his companion were boys of tender years, and wholly ignorant of the dangerous properties of said powder; that while playing upon said lot they found and discovered a box placed with its contents upon said lot by the defendant, containing a quantity of dynamite aforesaid, said box having been there placed by the defendant negligently, insufficiently, and deficiently covered; that the said children, having found the box as aforesaid, prompted by childish curiosity, opened the same and found therein the said sticks of powder; that thereupon the said William Kiger (the boy who was accompanying respondent), without fault or negligence on his part, and without fault or negligence of this plaintiff, took from said box, in plaintiff's immediate presence, one of the sticks of powder aforesaid, and, supposing it to be some kind of a fire-cracker, such as that in common use on that anniversary, ignited the fuse attached thereto, whereupon the said stick of powder exploded with great force, and by the explosion thereof the injury set forth in detail was caused. Damages were claimed in the sum of \$20,000. The complaint contains the other ordinary allegations in such cases. A demurrer was interposed to this complaint on the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled, and the overruling of the same is appellant's first assignment of error.

We think, if the powder was placed on vacant city lots, upon which children are accustomed to play, in the manner described by the complaint, that it is negligence on the part of the person so depositing it, and, in the absence of contributory negligence—which does not appear from the complaint—responsibility for damages will attach. There is a great diversity of decision upon cases of this character, the particular circumstances of each case generally con-

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trolling. But, without entering into an analysis of the many cases which might be cited, we think the cases cited by the respondent sustain the complaint in this case. *Harriman v. Railway Co.*, 45 Ohio St. 11 (12 N. E. 451, 4 Am. St. Rep. 507), it seems to us, is a parallel case. There the defendant or its servants negligently placed and left on the track an unexploded signal torpedo, at a place which had been used as a crossing. The torpedo was picked up by a boy of nine years of age, and carried by him into a crowd of boys near by. Being ignorant of its explosive character, he attempted to open it, the torpedo exploded, and the plaintiff, a boy of ten years of age, was injured by the explosion. It was held under this state of facts that the negligence of the company's servants was the proximate cause of plaintiff's injury. The only difference between that case and this is that in this case there had been an attempt to conceal the powder by burying it out of sight. But, if the testimony of the respondent and the witness Willie Kiger is true, the box was not completely buried, and nothing would appeal more strongly to the natural curiosity of a boy seven years old than a box in such a place partly disclosed. We think the complaint stated a cause of action, and there was no error committed in overruling the demurrer to the same.

It is strongly contended that the court erred in denying defendant's motion for a nonsuit, in denying the challenge of defendant to the sufficiency of the evidence, and in refusing to render judgment in favor of defendant against plaintiff upon the evidence. The evidence was contradictory, and, if the jury believed the testimony of the witnesses for the respondent—and the credibility of the witnesses was for the jury alone to determine—there was sufficient testimony to sustain the judgment.

The same may be said of the fourth assignment, that

the court erred in holding that the evidence showed that the powder was stored and kept in such a manner as to be rendered particularly attractive to children. We think that the instructions of the court generally stated the law fairly, and as favorably to the appellant as it was entitled to, both in relation to the independent agency of William Kiger, the boy who exploded the powder, and in every other particular, except instruction 28, which we will hereafter notice, and that no error was committed by the court in refusing instructions offered by the defendant, as such instructions, so far as they were justified by the law, had already been given by the court in its direct instructions. But the court instructed the jury as follows:

“I charge you further, that the testimony of expert witnesses is proper evidence to be received and considered by you, and is entitled to such weight with you as in your judgment as fair-minded men it is entitled to, but it is not of as high grade as evidence—is not as good evidence of a fact, as the testimony of a credible witness or witnesses who testify to having seen the fact itself occur. In other words, the testimony of an eyewitness to an occurrence, whom you find to be a credible witness, is entitled to more weight with you than that of an expert witness who did not see the occurrence, but testifies only to his opinion in the matter.”

The giving of this instruction is assigned as error, and, while it is contended by the respondent that such instruction embodies a proper statement of the law, and some cases are cited to sustain that view, yet this court has decided that expert testimony, being competent testimony under the law, must go to the jury as any other testimony in the case goes, and that the jury is the sole judge of the weight of such testimony, and that the court errs when by its instruction to the jury it discriminates in any way against the weight of such testimony. Such was the ruling

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of this court in *Gustafson v. Seattle Traction Co.*, 28 Wash. 227 (68 Pac. 721), and *In re Blake Estate*, 136 Cal. 306 (68 Pac. 827).

For this error, the judgment will be reversed, and the cause remanded for a new trial.

FULLERTON, C. J., and HADLEY, J., concur.

MOUNT, J., concurs in the result.

ANDERS, J.—While I have no doubt that the instruction of the court, as set forth in the foregoing opinion, was erroneous, I am also of the opinion that appellant's motion for a nonsuit and for judgment should have been sustained, on the ground that the evidence failed to show negligence on the part of appellant.

[No. 4529. Decided March 5, 1903.]

THE STATE OF WASHINGTON, *on the Relation of Allen F. Gill, Respondent*, v. P. F. BYRNE, *Appellant*.

21	213
39	381

CITY OFFICERS — REMOVAL FROM OFFICE BY VOTE — EFFECT OF MOTION TO RECONSIDER.

Where an ordinance creating an office provides that the incumbent may be removed upon the recommendation of the mayor, with the concurrence of the city council, one who has been removed in that manner and his successor duly confirmed can assert no right to hold the office by reason of the fact that motions to reconsider the votes on his removal and on the confirmation of his successor were pending.

SAME — TITLE TO OFFICE — CESSATION OF CONTROVERSY.

Action to try title to an office should be dismissed on the ground of the cessation of the controversy, where, after the commencement of action brought pending a motion before a city council to reconsider plaintiff's removal, a vote on the motion had been taken adversely to plaintiff.

Appeal from Superior Court, Spokane County.—Hon. GEORGE W. BELT, Judge. Reversed.

Cullen & Dudley, for appellant.

Robertson, Miller & Rosenhaupt and *Winston & Winston*, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This action is brought by the respondent to try title to the office of city engineer of the city of Spokane. The office of city engineer of said city is created by ordinance, and the ordinance creating the office provides that the incumbent may be removed from office upon recommendation of the mayor or board of public works, with the concurrence of a majority of all the members of the city council, or he may be removed, without recommendation of the mayor or board of public works, by a three-fifths vote of all the members of the city council. In the fall of the year 1901 the respondent was appointed to the position of city engineer, and duly qualified. On February 18, 1902, the mayor recommended his removal, in the following message to the city council:

“I hereby recommend the removal of Allen F. Gill from the position of city engineer and nominate instead for said position Mr. Peter F. Byrne.”

Upon the receipt of this message by the council, a motion was made and carried to concur in the recommendation of the removal, the vote standing six for concurrence and four against. After the vote was taken, but before the result was announced, councilman Baldwin, who had voted no, changed his vote to aye, and gave notice of his motion to reconsider the vote. A motion was thereupon duly made and seconded that the council confirm the appointment of the appellant, who was the person nom-

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inated by the mayor as city engineer. This motion was carried, seven members voting for, and three against, confirmation. Upon the conclusion of this ballot, councilman Baldwin, who had voted against confirmation, changed his vote to aye, and gave notice of a motion to reconsider this vote. The president of the council thereupon declared the appointment of the appellant as city engineer confirmed. On February 25, 1902, the appellant qualified by filing his bond and taking the oath of office. On March 4, 1902, at the next regular meeting, the motion to reconsider was taken up, the vote by which the council had affirmed the recommendation of the mayor was reconsidered, and, upon motion, the vote upon the affirmance was again taken, and the recommendation of the mayor was again confirmed, seven members of the council voting yea and three nay. The same action was taken on the mayor's message in relation to the appointment of the appellant as city engineer, and the chair declared the appointment of Peter F. Byrne as city engineer duly confirmed. The appellant demanded possession of the office, but the respondent refused to surrender the same, and has since remained in the undisturbed possession of the office. This action was brought to determine who was the proper incumbent of the office.

The right of the council and mayor to remove the engineer in the manner in which he was removed has been sustained by this court on principle in the case of *State ex rel. McReavy v. Burke*, 8 Wash. 412 (36 Pac. 281), and directly in the case of *Kimball v. Olmsted*, 20 Wash. 629 (56 Pac. 377). It is contended by the respondent that, inasmuch as he brought this action during the pendency of the motion to reconsider, this court must base its decision upon the title to the office as it existed at the time of the

commencement of the action; that, by reason of the reconsideration of the vote removing him, the respondent was a *de jure* officer, and that the appellant could not have his rights considered because he never thereafter qualified to take the office. It would seem that, when the council voted to concur in the recommendation of removal, the respondent was removed from the office, for that is the process of removal pointed out by the law. The giving of a notice that a motion would be made to reconsider could not possibly reinstate him in the office, for the motion might never be made, and, if made, it might not carry. So that the mere giving of a notice that a motion to reconsider would be made at some future time would not have the effect of abrogating the positive action of the council in declaring his removal, or the other positive action of confirming the appointment of the appellant. But conceding, for the purposes of this case, that it would, still it would not avail the respondent; for, even if his action were properly brought at the time it was brought, yet, subsequent to that time and before the trial, he had been removed from the office by action of the council in again confirming the recommendation of the mayor after the reconsideration and upon the final vote on that question. It being made to appear to the court that he had been legally removed at the time of the trial, the subject of the controversy had ceased, so far as he was concerned, and neither that court nor this could give him any relief, under the rule announced in *Hice v. Orr*, 16 Wash. 163 (47 Pac. 424), and many cases subsequently decided.

The judgment is reversed, with instructions to the lower court to dismiss the cause.

FULLERTON, C. J., and MOUNT, HADLEY and ANDERS, JJ., concur.

[No. 4603. Decided March 5, 1903.]

COUNTY OF JEFFERSON, *Respondent*, v. JOHN TRUMBULL
et al., *Appellants*.

31	217
f31	685

DISMISSAL OF APPEAL — FAILURE TO FILE BRIEF — EXCUSED BY FAILURE TO RETURN STATEMENT OF FACTS.

Under Bal. Code, § 5063, which provides that the proposed statement of facts served upon the respondent shall be returned to the appellant for his use in preparing his brief on appeal, and the time limited by law for filing his brief shall be enlarged to the same extent as the delay made in returning such copy, an appeal should not be dismissed where the failure to file brief was occasioned by delay in returning the statement, even if such proposed statement was faulty and had required considerable amendment.

Appeal from Superior Court, Jefferson County.—Hon. GEORGE C. HATCH, Judge. Dismissal of appeal denied.

Trumbull & Trumbull, for appellants.

J. M. Ralston and *A. W. Buddress*, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—Respondent moves to dismiss the appeal in this case for the reasons (1) that the appellants have not served nor filed any brief on appeal in the action within the time prescribed by law, or at all; and (2) that said appellants have not diligently prosecuted their appeal.

It is conceded by the appellants that they have not served nor filed their briefs on appeal in this action within the time prescribed by law, but their justification is, as shown by the affidavit of their attorney, that the proposed statement of facts, which was furnished by the appellants to the respondent's attorneys, has never been returned to the appellants or their attorneys. Section 5062, Bal. Code,

provides that "a proposed bill of exceptions or statement of facts must be filed and served either before or within thirty days after the time begins to run within which an appeal may be taken from the final judgment in the cause, or (as the case may be) from an order with a view to an appeal from which the bill of statement is proposed"; and § 5063 provides that "the copy of a proposed bill or statement which is served as in this chapter prescribed, shall be returned to the party serving the same upon the bill or statement being certified, if he has appealed to the supreme court, or upon his thereafter appealing, for his use in preparing his brief on the appeal, and the time limited by any law or rule of court for the service and filing of his brief shall be enlarged by any delay in returning such copy as herein required to the extent of such delay." So that, under the plain provisions of the statute, the appellants are not in default if it is true that the proposed statement of facts has not been returned to them.

But to overcome this defense an affidavit is filed by respondent's attorney to the effect that the proposed statement of facts and bill of exceptions which was served upon the respondent by the appellants was a sham and false statement of facts; that the respondent proposed amendments to the appellants' proposed statement of facts and bill of exceptions, many of which the court allowed; and that said statement of facts and bill of exceptions was revised by said trial court. A motion was made by the respondent to strike the proposed statement of facts and bill of exceptions of the appellants, upon the ground that it was sham and false, and not a full, true, and correct statement of all material facts concurring at said trial. But the court, upon examination of said proposed statement of facts, denied the motion.

It frequently occurs that the proposed statement of facts

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is not the statement in its entirety which is certified to by the court. The object of serving the proposed statement is to elicit amendments if the respondent has any to offer. But the proposed statement of facts served upon the respondent in this case, notwithstanding the fact that amendments were offered and incorporated into the certified statement, was a proposed statement of facts under the statute, and it does not appear that there was any reason why the respondent should not have returned this proposed statement of facts, faulty though it may have been, to the appellants. The law seems to be mandatory on this proposition, and we do not feel justified in dismissing the appeal under the circumstances shown, viz.; that the proposed statement of facts was not returned to the appellants.

The motion will be denied.

FULLERTON, C. J., and HADLEY, MOUNT and ANDERS, JJ., concur.

[No. 4364. Decided March 7, 1903.] -

W. H. FERNALD, *Respondent*, v. SPOKANE AND BRITISH COLUMBIA TELEPHONE AND TELEGRAPH COMPANY *et al.*, *Respondents*.

RECEIVERS — APPOINTMENT BY COURTS OF CONCURRENT JURISDICTION — EXCLUSIVE CONTROL BELONGS TO FIRST APPOINTEE.

Where the superior court of one county has appointed a general receiver for an insolvent corporation with power to take possession and control all its property, it is error for the superior court of another county to appoint either the same or another person receiver for such corporation, even if done on the theory that the subsequent appointment was merely to extend the existing receivership to a foreclosure suit against the corporate property.

Appeal from Superior Court, Spokane County.—Hon. WILLIAM E. RICHARDSON, Judge, Reversed.

Post, Avery & Higgins, for appellants.

Cullen & Dudley, for respondents.

The opinion of the court was delivered by

MOUNT, J.—On August 21, 1901, the respondent commenced an action in the superior court of Spokane county against the Spokane & British Columbia Telephone & Telegraph Company, the Inland Telephone & Telegraph Company, and the Pacific States Telephone & Telegraph Company, defendants in this action praying for a receiver for the first-named company, and for damages against the other two companies. Thereafter, on September 18, 1901, upon motion of plaintiff, one A. D. Campbell was appointed receiver of all the property of the said Spokane & British Columbia Telephone & Telegraph Company, with full power and control over the same, and with authority to continue the operation of the business of said company, to collect all claims and property belonging to said company, and to defend and prosecute all suits in or to which the said company may be a party; and thereupon the said receiver qualified, and took possession of all the property of the said company of every character and description. That action is still pending, and Mr. Campbell is still receiver, in possession of all the property, and conducting the business of said company. Thereafter, in the month of February, 1902, the respondent here, who was and is the plaintiff in the action above named, commenced this action in the superior court of Stevens county to foreclose a first mortgage upon all the property of the said Spokane & British Columbia Telephone & Telegraph Company, and prayed for the appointment of a receiver of said property

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in said court. It appears from the complaint that the property of the defendant Spokane & British Columbia Telephone & Telegraph Company, upon which respondent claims a first mortgage, which he is seeking to foreclose in this action, is located partly in Spokane county and partly in Stevens county, in this state, and that the respondent's mortgage was recorded in both Spokane and Stevens counties. After the filing of the complaint in the last named case, and on the 11th day of February, 1902, upon a hearing upon the application of the plaintiff (respondent here) for a receiver, the superior court of Stevens county appointed A. D. Campbell such receiver, with general powers, as was done in the case pending in Spokane county. Mr. Campbell, appointed receiver in Stevens county, is the same person who was appointed receiver by the superior court of Spokane county.

The defendants in this last-named action appeal from the order of the court appointing a receiver in this case, and, among other errors, allege "that there is already a receiver of said corporation appointed by and acting under the superior court of Spokane county." They argue that it was error for the lower court to appoint the same or another receiver in this case, because there was no necessity for a second receiver, a receiver having already been appointed over all the property of every character and description belonging to the defendant, in another court and cause, to which the respondent was and is a party. We think this point is well taken. Mr. High, in his work on Receivers (3d ed.), at § 48, says:

"As between different courts appointing the same person receiver in different actions, it is held that the court first appointing him acquires exclusive control over the fund and the receiver holding it, and it will not permit such control to be interfered with by the subsequent appointment

of the same person in another cause, but will in the exercise of its powers proceed to disburse the fund as may be proper. Indeed, when a court of competent jurisdiction has appointed a receiver, who is in possession of and administering the property under its orders, another court of co-ordinate jurisdiction will not entertain a bill to administer the same property, and to take it from the possession of the former receiver, and to appoint its own receiver. In such a case, the parties aggrieved should seek relief in the court which is already in possession of the property through its receiver."

To the same effect are: 20 Am. & Eng. Enc. Law, pp. 89-134; *Lloyd v. Chesapeake, etc., R. Co.*, 65 Fed. 351; *State v. Jacksonville, etc., R. R. Co.*, 15 Fla. 201, 276; *O'Mahoney v. Belmont*, 62 N. Y. 133; *People v. Central City Bank*, 35 How. Pr. 428.

The superior courts of Spokane county and of Stevens county are each courts of general jurisdiction, and the process of each extends to all parts of the state. Const. art. 4, § 6. No doubt each of these courts, prior to the time the other had taken the property into its possession, had jurisdiction to appoint a receiver, with power to take possession and control of all the property of the defendant Spokane & British Columbia Telephone & Telegraph Company, for both counties. But when one court has made such appointment, and its receiver is qualified, and has taken possession of all the property of the defendant, then the other may not appoint the same or another person receiver with like authority. Numerous objections to such a practice readily suggest themselves.

But it is contended by respondent that the order last made by the superior court of Stevens county was to extend the receivership already in existence to a second foreclosure suit, and the following authorities are cited to sustain such practice, viz: *Lloyd v. Chesapeake, etc., R. Co.*, *supra*;

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High, Receivers, § 688; *Osborn v. Heyer*, 2 Paige, 342; *Howell v. Ripley*, 10 Paige, 43; *Putnam v. McAllister*, 57 N. Y. Supp. 404; *Alabama Iron & Steel Co. v. McKeever*, 112 Ala. 134 (20 South. 84); *St. Louis Car Co. v. Stillwater Street Ry. Co.*, 53 Minn. 129 (54 N. W. 1064). These authorities, as we read them, do not hold that, where a receiver has once been appointed over all the property of a corporation, the plaintiff at whose suit such receiver is appointed may go into some other court of co-ordinate jurisdiction, and bring another suit, and have another or the same receiver appointed, with the same or equal powers as the first over the same property. *Lloyd v. Chesapeake, etc., Ry. Co.*, was a case where a judgment creditor brought suit against a railway company, and receivers were appointed in that suit to collect the earnings of the company, and apply such earnings on the judgment. Subsequently certain second mortgage bond holders brought an original action in the same court, and asked for an independent receivership. The actions were consolidated, and the receivership already in existence was extended to the second suit. But the court in that case said:

“I think there ought not to be an independent receivership under this bill. That would require the discharge of the receivers heretofore appointed, and the winding up of that receivership, for there could not be two independent receiverships of the same property.”

Osborn v. Heyer, supra, was a contempt proceeding, where two suits had been commenced in the same court by different plaintiffs against the same defendants. In one of the cases a receiver was appointed to take possession of defendant's property. In the other a restraining order was issued, prohibiting the defendants from collecting the debts, and preserving the property from waste. The defendants, on account of the restraining order, refused to

deliver the property to the receiver. The court held that the receiver was entitled to the possession of the property, and directed the whole thereof to be delivered to him, to be collected, and converted into money, for the benefit of the parties to whom it may appear to belong. *Howell v. Ripley* and *Putnam v. McAllister* support the rule announced by Mr. High in his work on Receivers, at § 688, where, referring to the right to rents and profits of mortgaged property, he says:

"The general rule is that a junior mortgagee, who obtains a receiver of the rents and profits, in aid of a bill to foreclose his mortgage, is entitled to the rents and profits at the hands of such receiver, up to the time of appointing a receiver upon a bill by a prior mortgagee, not a party to the original suit. And the prior mortgagee is only entitled to have of the receiver such rents and profits as accrue after the appointment in aid of such prior mortgagee, although one and the same person is appointed in both cases."

The Alabama case is not in point on this question. *St. Louis Car Co. v. Stillwater Street Ry. Co.* was a case where a receiver was appointed in a suit to foreclose a mortgage upon certain property. Thereafter a judgment creditor brought an action under the Minnesota statute to sequester the property of the defendant company, and have a receiver appointed for all the property of the defendant company. In deciding the question raised, the court said:

"The fact that a receiver had already been appointed in the foreclosure suit constituted no reason why a receiver should not be appointed under 1878, G. S. ch. 76. A receivership in a suit to foreclose a mortgage is only for the purposes of the foreclosure, and however general the language of the appointment, affects only the property covered by the mortgage. Its purpose is to preserve the mortgaged property for the benefit of the mortgagee. *Lowell v. Doe*, 44 Minn. 144 (46 N. W. Rep. 297). On the other hand, the object of a receivership of an insolvent

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corporation under 1878, G. S. ch. 76, is to sequester all its property for the benefit of all its creditors. The powers of the receivers in the two cases are entirely different. There are various classes of property that can be reached by a receiver under chapter 76 which could not be reached by a receiver appointed in a foreclosure suit. The former has substantially all the powers and functions of an assignee in bankruptcy. Everything becomes assets in his hands which are assets as to creditors, although not assets as to the corporation, as, for example, property conveyed in fraud of creditors, capital withdrawn without provision for the payment of corporate debts, the personal liability of stockholders, etc."

The effect of these decisions is that, where a receiver is appointed over a portion of the property of a defendant, the receivership may be extended to other property at the suit of a new party claiming an interest in the property already in possession of the court, and also in other property belonging to the defendants. But where the receivership in the first instance is general, and the receiver is appointed to take possession of all the property of every character and description and preserve it for the benefit of creditors entitled thereto there is no necessity for another receiver having like powers. Under the statute of this state a receiver will not be appointed at the suit of a mortgagee to foreclose his mortgage where there is no danger of the property being lost, removed or materially injured. § 5456, Bal. Code. Where it appears that the property is already in the possession of a court of competent jurisdiction by its receiver, there is no necessity for another receiver in an action to foreclose a mortgage upon the property, so long as the receiver is acting in good faith and the property is not in danger of being lost, removed or materially injured.

The order appointing the receiver in this case was a

general order, practically a copy of the order appointing the receiver in the Spokane county case; it recites as fully the powers and duties of the receiver as did the order in the Spokane county case. If the court in this case had authority to appoint another receiver, it certainly had authority to appoint some other person. We think such practice, if permitted, would inevitably lead to injurious results in the administration of justice where receivers are permitted.

For this reason the order appointing the receiver in this case is reversed, and the cause remanded.

FULLERTON, C. J. and ANDERS and DUNBAR, JJ.,
concur.

[No. 4391. Decided March 7, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. HARRY
MORGAN, *Appellant*.

ROBBERY — SUFFICIENCY OF INFORMATION — ALLEGATION OF OWNERSHIP OF PROPERTY.

An information charging larceny committed by unlawfully and feloniously stealing and taking away certain property from the person of another is insufficient when it fails to allege the ownership of the property (*State v. Dengel*, 24 Wash. 49, followed).

Appeal from Superior Court, Snohomish County.—
Hon. JOHN C. DENNEY, Judge. Reversed.

S. A. Bostwick, for appellant.

H. D. Cooley, Prosecuting Attorney, for the State.

The opinion of the court was delivered by

FULLERTON, C. J.—The appellant and one Corena Wright were jointly informed against by the prosecuting

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attorney of Snohomish county for the crime of robbery. The information, omitting the formal parts, was as follows:

“Comes now H. D. Cooley, county and prosecuting attorney, in and for Snohomish county, state of Washington, and by this, his information accuses Corena Wright and Harry Morgan of the crime of larceny from the person, committed as follows, towit: That the said Corena Wright and Harry Morgan, at the city of Everett in the county of Snohomish and state of Washington, on the 4th day of March, 1902, did unlawfully and feloniously, but without violence or putting in fear, take, steal, and carry away from the person of one Frank Meeks, then and there being, one gold filled hunting case Elgin watch of the value of \$20 and one gold band ring of the value of \$5.00, all of the value of \$25 in lawful money of the United States; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Washington.”

A demurrer to the information was interposed by the defendants on the ground that it did not state facts sufficient to constitute a crime. The demurrer was overruled, whereupon the respondent entered a plea of not guilty, and demanded and was granted a separate trial. The trial resulted in a verdict of guilty as charged in the information, and he appeals from the judgment and sentence pronounced thereon.

It will be noticed that the information contains no allegation as to the ownership of the property alleged to have been taken from the person of Meeks, and the sole question presented by the record is, does this omission render the information insufficient? In *State v. Dengel*, 24 Wash. 49 (63 Pac. 1104), an information for robbery by violence and putting in fear which omitted to allege ownership of the property taken was held not to state a

crime. It is urged, however, that there is a distinction between that case and the case at bar, in that the information in that case does not contain the word "steal" in its charging part, while the present one does contain such word. But it seems to us that this distinction is not material. The words "did feloniously steal and take," are no more effective to charge ownership of property than are the words "did feloniously take." The case cited is squarely in point, and, being so, is controlling.

The judgment is reversed, and the cause remanded, with instructions to sustain the demurrer to the information.

DUNBAR, MOUNT and ANDERS, JJ., concur.

31 228
32 676
32 677

[No. 4215. Decided March 9, 1903.]

MELISSA C. BUDLONG, *Respondent*, v. EDITH J. BUDLONG,
Appellant.

LANDLORD AND TENANT — ESTABLISHMENT OF RELATION — CONTRACT
OF DIVORCED HUSBAND AND WIFE — CONSTRUCTION — MATERIALITY
OF EVIDENCE.

A husband and wife were divorced and certain real property was conveyed to the husband by the wife, under a written agreement that she should have the right to live there free of rent until her death, remarriage, or a *bona fide* sale of the property by the husband, in which latter event she was to be secured for the payment by him of the monthly value of the premises. The husband remarried and made a conveyance of the premises to his second wife, agreeing to pay the former wife, but without giving security therefor, the monthly value thereof if she would surrender possession, which was done by her, but, on failure to pay her the value of the monthly rental, she brought an action against her former husband and his present wife on the theory that plaintiff had a life estate in the premises, that defendants were occupying it as her tenants, and had failed to pay the monthly rental agreed upon. The defendants sought to show

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that plaintiff's conduct on leaving was inconsistent with her theory of an interest in the property. *Held*, that evidence to that effect was properly excluded, as plaintiff's relations to the property should be determined by the terms of the written agreement, unless subsequently modified.

SAME — WAIVER OF RELATION.

Under an agreement that plaintiff held an estate in property which could be terminated only by death or marriage, or by a *bona fide* sale by the holder of the fee, with the rental value perpetually secured to her as long as she remained alive and unmarried, the yielding by her of possession to the holder of the fee and his wife, in consideration of the payment of a monthly sum, would not be inconsistent with her estate, where no provision was made for securing to her the monthly payments and these were merely treated by her as a rent charge; nor would the fact that such monthly payments to her were sometimes designated in the receipts as "contract money" change the relation of the parties from that of landlord and tenant to something else.

APPEAL — SUFFICIENCY OF EVIDENCE.

The verdict of the jury will not be disturbed, when the evidence is conflicting and the case has been submitted to them under proper instructions.

Appeal from Superior Court, King County.—Hon. GEORGE MEADE EMORY, Judge. Affirmed.

John F. Dore, for appellant.

Carroll & Carroll, for respondent.

The opinion of the court was delivered by

HADLEY, J.—Appellant, Edith J. Budlong, and her co-defendant in this cause, George E. Budlong, are husband and wife. Respondent, Melissa C. Budlong, was formerly the wife of said George E. Budlong; but the two were divorced by decree of the superior court of King county, Washington, on the 10th day of November, 1893. On the same day the decree of divorce was entered respondent by quitclaim deed conveyed to her said divorced husband

certain real estate situate in the city of Seattle. The property consisted of a lot and a dwelling house thereon, in which respondent was at the time residing. On the same day respondent and her said divorced husband entered into a certain written contract relating to the property above mentioned. Omitting the description of the property, the contract is as follows:

"This indenture witnesseth that George E. Budlong, party of the first part, and Melissa Caroline Budlong, the party of the second part, have agreed and hereby stipulate and agree as follows, towit:

"That for the sum of one dollar (and other good and sufficient consideration, the receipt whereof is hereby acknowledged) paid and delivered by the said party of the second part to the said party of the first part, the said party of the first part does hereby grant, lease and demise unto the said party of the second part the following described property in the city of Seattle, county of King and state of Washington: [Here follows description of property.] That the said use and lease is hereby granted for and during the life time of the said party of the second part, provided that this lease shall cease and determine from and after the marriage of the said party of the second part, it being understood that this lease is made for the use and benefit of said party of the second part during her life time or as long as she remains a single woman; provided further that said party of the first part shall have the right at any time to sell the said property; provided further, that when such sale is made said party of the second part shall surrender to the purchaser thereof the possession of the premises on the securing to her by the said party of the first part the monthly payment of the monthly rental value of the said premises; provided further, that such payment shall cease and determine on the death or marriage of said party of the second part; that the said party of the first part shall pay monthly to the said party of the second part the sum of fifteen dollars (\$15) for the board and lodging of

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Walter E. Budlong, the minor child of the said parties, so long as said child makes his home with the mother, the said party of the second part, and no longer; provided that the said payment for the said child shall cease when he shall have reached the age of twenty-one (21) years.

"That the said party of the first part, in addition to the payment of the said sum of fifteen dollars (\$15) for the use of the said child as aforesaid shall also during his minority bear the expense of clothing the said child and of educating him, the same to be provided as occasion and circumstances may require.

"That when said property is sold, should the said second party be entitled to the monthly rental value thereof, such value, and the means of securing it as heretofore provided should the parties not be able to agree thereon, shall be ascertained and determined by arbitrators appointed as follows: Said first and second party shall appoint one person each, and the said two persons so appointed shall select a third person and the said three persons shall fix the rent to be paid monthly to the said party of the second part, and shall determine upon the means of securing the same.

"Should the said residence on the said premises be destroyed by fire the said first party shall rebuild the same or pay to the said second party the current monthly value thereof which payment shall be made each and every month as long as the said second party is entitled to receive the same according to this instrument or until the said residence is rebuilt."

The instrument was signed and duly acknowledged on the day of its date by both parties thereto. Agreeably to the terms of said contract, respondent continued in possession of the premises mentioned therein, and on the 5th day of December, 1894, said George E. Budlong conveyed the property by deed to appellant, Edith J. Budlong, who had in the meantime become his wife. About this time respondent vacated the property and yielded possession to appellant, in consideration of an oral agreement that she

should receive the monthly payment of \$18.50 in cash. For failure to continue these payments, respondent, on the 8th day of April, 1901, served a written notice upon appellant and her husband, which was in form a notice to terminate a tenancy and a demand for surrender of possession of the above-named premises. Surrender of possession was refused, and respondent thereupon brought this action for possession and for damages because of the detention of the premises. The theory of the complaint is that respondent is seized for life of the premises, and that she stood in the relation of a lessor to appellant and her husband as lessees. Appellant and her husband and co-defendant answered, admitting the service of the notice to quit, but they deny that they were in possession as tenants of respondent under a lease for an indefinite time, or under any lease whatever, or that their possession depended upon any relation growing out of landlord and tenant with respondent. They further answer, setting up the written contract hereinbefore set out, and also aver that for full value received said George E. Budlong sold and conveyed the premises to his wife, Edith J. Budlong, the appellant. They further aver that upon the making of said sale the said George E. Budlong and the respondent, acting under the provisions of said written agreement, and in order to induce respondent to surrender to appellant, as purchaser of said premises, the possession thereof as in said contract provided, had a settlement and mutually agreed that the monthly payment to be made to respondent by said George E. Budlong, calculated and fixed as in the contract provided, was the sum of \$18.50; that it was further agreed that the promise of George E. Budlong to pay said sum monthly was sufficient, and that the giving of additional security was waived; that thereupon respondent abandoned the possession of the premises and surrendered

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the same to appellant, who has ever since held the same; and that said George E. Budlong has kept and performed his part of said agreement, and has paid all monthly sums agreed to be paid. The above allegations are denied by the reply, and it is affirmatively alleged, by way of reply, that the deed from George E. Budlong to Edith J. Budlong his wife, was made without any consideration of value whatever, and for the sole purpose of hindering, delaying, and defrauding creditors of said George E. Budlong, and with the purpose and intent to defraud respondent, and delay the payment of judgments obtained by respondent against him, which purpose was known to appellant; that said deed was also made and delivered with the express purpose and intent on the part of said husband and wife to defraud, hinder, and delay the execution of the provisions of the written contract hereinabove set out. Upon the above issues the cause was tried before a jury, and resulted in a verdict in favor of respondent, that she is entitled to a restitution of the property described in the complaint, and assessed her damages in the sum of \$158.75. Motion for new trial was denied, and judgment was entered in accordance with the verdict. From the judgment the defendant Edith J. Budlong alone appeals.

It is assigned as error that the court refused to permit appellant to show what respondent did in relation to the property when she was leaving it. It is appellant's contention that the conduct of respondent when she was leaving the premises was inconsistent with the theory that she believed she had any interest in the property, and that the testimony was admissible as throwing light upon her intentions. It appears to us, however, that respondent's relation to the property must be determined by the terms of the written agreement above mentioned, unless that agreement has been nullified by the mutual consent of herself

and her former husband. Mere conduct in the way of removing something from the premises would neither show nor necessarily tend to show that respondent had actually released her rights under the written agreement and had no further interest in the property. It might with equal force be argued that such conduct would tend to show her belief that she still had an interest in the premises, and such an interest as gave her a right to the removal of such articles. The record upon which this error is assigned is as follows: Appellant's counsel asked her the following question: "I will ask you to state whether or not at that time she took anything belonging to the property away." An objection was made, but the witness answered: "She tore it all up." Her counsel then stated the purpose of the examination, and what he desired to show. The court announced the objection sustained, but no motion was made to strike the answer, and it remained in the record as a part of the testimony. No other question was asked her upon that subject. Under the circumstances, even if the evidence were material, we think no prejudicial error can be predicated upon the record as made.

It is assigned that the court erred in refusing to grant a new trial. It is contended that the verdict of the jury is against the weight of the testimony, and that respondent failed to sustain the allegations of her complaint. The evidence shows that for a time after respondent left the premises the monthly payments were made, and then for a long period they were neglected. A suit was brought by respondent for the enforcement of these neglected payments, which resulted in the collection by her of about \$1,100 on account thereof. The payments were, however neglected again, and this suit was then brought for the purpose of restoring respondent to possession of the prem-

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ises. The written contract in evidence undoubtedly established in respondent a life estate in the premises if she remained unmarried, subject, only, to the condition that if George E. Budlong, the holder of the fee, should sell the property, she would surrender possession, if he secured her the monthly payments of the monthly rental value of the premises. Whether George E. Budlong actually sold the premises as contemplated by the written agreement, or whether the transfer was made for no valuable consideration and for a fraudulent purpose is squarely in issue under the pleadings. The testimony of appellant is that the transfer was made to her for an actual money consideration. But in this she is not supported by her husband and codefendant, the grantor in the deed. Appellant says that, when she and her husband were married, she owned household furniture worth about \$3,000, and that by agreement with her husband it was determined that she should remove the same to her husband's residence, and they would use it as the furniture of their home. This was done, and appellant testified that the transfer to her of the property in controversy here was made in consideration of the purchase of the household furniture by her husband. This her husband and codefendant denies, and further says that there was no money consideration for the transfer. He further testified as follows:

"Q. Now, state to the court how you came to give that deed, please. A. Well, I don't hardly know. She kept wanting me to make the property over to her all the time, and to kind of pacify her I done it. She wanted the property made over to her. She kept at me to deed the property to her, and claimed that the other party was going to get away from us, all the time, so as she couldn't get it in her name."

There was testimony, therefore, upon which the jury

could find that there was no actual sale of the property as was contemplated by the written contract, and such as placed respondent under compulsory obligations to surrender possession. It is true respondent did surrender possession about the time the deed to appellant was made, and appellant claims that the surrender was made by virtue of the requirement to that effect in the written contract, and that respondent waived her right to security for the monthly rental value of the property—a right given to her by the contract. The testimony shows that the attorneys of respondent and George E. Budlong agreed upon the sum of \$18.50 as a monthly sum to be paid in the event respondent vacated the property, and that she acquiesced in the acceptance of that sum. There is however, no testimony that respondent authorized the waiving of security for the payment of the monthly sums as they should mature. The attorney who acted for George E. Budlong at that time testified that he so understood it from respondent's then attorney, but not from respondent herself. Her own attorney does not testify that he had such authority, and his memory of the whole transaction seems to have been vague and indefinite. The proposition needs only to be stated that, without special authority from respondent to waive the giving of the security which her written contract required, her attorney could not waive so valuable a contract right. The jury could therefore find, under the evidence, that no actual sale was made, that respondent may have voluntarily yielded possession to appellant simply in consideration of the payment of \$18.50 monthly, and that she did not release her rights in the property under the contract and accept in lieu thereof the unsecured promise of her former husband. These questions of facts were all submitted to the jury. The jury found the facts in

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favor of respondent, and the verdict is supported by testimony in the record. We shall not undertake to say that the jury should have found the weight of the disputed testimony to be in appellant's favor. That is for the jury to determine, and we do not find in the record any manifest abuse of their prerogative. The instructions of the court were very clear and definite as to the law governing all the facts submitted to the jury, and we think fully and correctly covered every feature involved in the case. The record does not disclose that appellant even excepted to the instructions. Under such circumstances, and for mere conflict of evidence, the verdict should not be disturbed. *Herrman v. Great Northern Ry. Co.*, 27 Wash. 472 (68 Pac. 82, 57 L. R. A. 390); *Johnston v. McCart*, 24 Wash. 19 (63 Pac. 1121); *Swadling v. Barneson*, 21 Wash. 699 (59 Pac. 506).

While the record presents a case of mere conflicting evidence yet we have discussed the pleadings and facts somewhat at length, in order that the legal relations of the parties, following from the facts as found by the jury, may be the better understood. Under the facts which it was competent for the jury to find, under the evidence as above stated, respondent was entitled to the possession of the premises when she failed to receive the payment of the agreed monthly sums. She held an estate in the property which could only be terminated by death, marriage, or a *bona fide* sale by the holder of the fee, with the rental value perpetually secured to her as long as she remained unmarried. It is not inconsistent with the holding of such an estate that she may have yielded possession to appellant and her husband in consideration of the payment of a monthly sum. Her estate was such that she might have made such an arrangement with any other person, and between them the relation of landlord and tenant would

have existed. Under the facts as resolved by the jury, such was the relation between respondent and appellant and her husband. The fact that the monthly payments at times paid by appellant and her husband may have been designated, in the receipts given, as "contract money," does not change the relation from that of landlord and tenant to something else. It matters not what the money was called, if in fact it was paid as a consideration for the right of possession under respondent as the holder of the estate created by her contract with George E. Budlong.

We find no reversible error, and the judgment is affirmed.

FULLERTON, C. J., and MOUNT, DUNBAR and ANDERS, JJ., concur.

[No. 4354. Decided March 9, 1903.]

J. EMIL JOHNSON, *Respondent*, v. SAN JUAN FISH AND PACKING COMPANY, *Appellant*.

TRIAL — THEORY OF PARTIES AS TO CONSTRUCTION OF CONTRACT.

In an action for damages for breach of contract, which was tried by both parties on the theory that a written memorandum between them did not contain all of the contract governing one of the elements of damage, the defendant would not be entitled to have withdrawn from the jury the evidence relating to such item of damages, because of its not being within the provisions of the written memorandum.

SAME — WITHDRAWAL OF EVIDENCE FROM JURY — IMPROPER ATTACK ON OBSCURE PLEADING.

The fact that the allegations of a complaint are not so full and particular as they should be respecting any issue cannot be taken advantage of by motion to withdraw from the jury the evidence upon such issue, where the allegations are sufficient to advise defendant of the nature and amount of the demand against him.

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BREACH OF CONTRACT—DAMAGES—EVIDENCE.

In an action for damages for breach of contract to return plaintiff to Seattle at the close of the Alaska salmon season, evidence of the average earnings of fishermen in the waters of Puget Sound during the time plaintiff was detained therefrom after the close of the Alaska season was admissible, when it appeared that fishing was the fixed occupation of plaintiff, that he was the owner of appliances which enabled him to engage in that occupation, and was reasonably certain of employment in the waters of Puget Sound at his particular occupation.

SAME.

In an action to recover damages for delay in transporting plaintiff, with his boat, fishing tackle and helper from Alaska to Seattle, a verdict allowing three dollars per day on account of the helper during the period of detention was erroneous, in the absence of evidence showing the reasonable value of such services to be worth that sum, the defendant not being bound by the contract rate of wages between plaintiff and his helper, nor by evidence of the value of such helper's services as a fisherman.

Appeal from Superior Court, King County.—Hon. ARTHUR E. GRIFFIN, Judge. Reversed.

Bogle & Richardson and *Thomas M. Vance*, for appellant.

George Revelle and *John Larrabee*, for respondent.

The opinion of the court was delivered by

FULLERTON, C. J.—In 1901 the appellant was the owner and operator of a salmon cannery, situated at Taku Harbor, in the Territory of Alaska. The respondent was a fisherman living in or about the city of Seattle, Washington, and was the owner of certain boats and fishing gear, suitable for fishing for salmon in the waters tributary to the appellant's cannery. About May 2, 1901, at Seattle, Washington, the parties entered into the following agreement:

"Memorandum of agreement between the San Juan Fish & Packing Company and J. E. Johnson.

"Parties of the first part, San Juan Fish & Packing Co., agree to pay parties of second part seven (7) cents for all sockeye and silver salmon caught during season of 1901, and 1½ cents per piece for as many hump back salmon as they may be able to use, and will pay for spring salmon the regular market price at the time of delivery.

"Parties of the first part agree to provide transportation for parties of the second part, and the parties of the second part agree to furnish necessary webbing and boats for one purse seine and to maintain same in repair at their own expense.

"Parties of the first part agree to allow a board allowance of \$15.00 per month for crew of five to seven men. It is understood, however, that if parties of second part fail to keep the terms of this agreement, parties of the first part may withhold enough of the above amount of \$15.00 board allowance to cover expenses of transportation of crew and gear, both going and coming."

Pursuant to the agreement, the appellant carried the respondent, with his fishing crew, boats, and gear, from Seattle to Taku Harbor, early in May, where the respondent engaged in fishing until September 1st following, delivering all the fish caught by him to the appellant's cannery at the prices named in the contract, and otherwise complying with the terms thereof. At the date last named he came in from the fishing grounds to the cannery, and stated to the appellant's manager that he desired to be returned to Seattle with his crew, boat, and gear, giving as his reason therefor that the fish had become so scarce it was no longer profitable to fish for them. On the next day—September 2—a steamer plying regularly between Seattle and Alaskan ports called at the cannery at Taku Harbor, being on its way to Seattle. The appellant's agent attempted to procure transporta-

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tion for the respondent on this steamer, but was unable to get transportation at all, as he testifies, or at satisfactory terms, as respondent's witnesses testify, for the boat and gear, although he could secure transportation for the men, which he offered them, promising to send the boat and gear later. Three of the crew went on the steamer. The respondent declined to go unless he could take his boat, and stayed at the cannery, keeping with him one of his crew to assist in its care while he should be detained there. The next steamer called twenty-three days later, when transportation for the respondent, his assistant, boat, and gear were secured thereon by the appellant's agent. In this action the respondent sues for the following items:

1. For fish delivered under the contract..\$1,188.92
2. For board allowance 240.00
3. For purchase price of boat and gear sold
the appellant 102.20
4. For damages sustained by his detention
at Taku Harbor for 23 days after he
had quit fishing 262.00

Total\$1,793.12

He admits receiving from the appellant
in money, stores, etc 699.78

Leaving a balance of\$1,093.34

In his prayer for judgment, however, he demanded \$1,099.34. The answer of the appellant substantially admitted all of the above items save the last. On this issue was joined, both as to the amount of damage suffered and as to the appellant's liability therefor. The answer also set up a counterclaim by way of an affirmative defense, in which it was alleged that the respondent undertook to fish

throughout the entire fishing season,—that he failed and refused to do so, and that the appellant was damaged thereby in the sum of \$1,000. The verdict of the jury was for the amount demanded in the prayer of the complaint, namely, \$1,099.34—six dollars in excess of the total of the several items set out in the complaint which made up the demand.

The first error assigned is on the ruling of the court refusing to sustain the appellant's motion to withdraw from the jury all the evidence relating to the claim for damages for the alleged delay in securing transportation for the respondent, his assistant, boat, and gear from Taku Harbor to Seattle. This motion was based upon two grounds: First, that the contract did not obligate the appellant to return the respondent to Seattle before the close of the fishing season, which event had not happened at the time the respondent demanded transportation; and, second, because the complaint did not, on this branch of the case, state facts sufficient to constitute a cause of action. The written memorandum it will be noticed, does not in terms provide a time when the respondent was entitled to be returned; but the writing does not, on the theory of either party, contain all of the contract. Evidence was introduced without objection on the part of the respondent tending to show that he refused to sign a contract obligating himself to stay until the close of the fishing season, and on the part of the appellant to the effect that such was the contract, and that it was understood that the respondent agreed to wait and return on the appellant's own steamer. The court submitted the questions to the determination of the jury, we think, rightly. When the parties themselves try their case upon a certain theory, they cannot afterwards complain that such theory is incorrect. The second

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ground for the motion was equally untenable. While the allegations of the complaint were not as broad and full as they might have been, still they were sufficient under this form of objection. They advised the appellant of the amount claimed as damages and of the nature of the demand. If the appellant wished for a fuller or more particular statement, it should have attacked the complaint before joining issue of fact thereon.

It is next contended that the court erred in admitting evidence tending to show the average earnings of fishermen engaged in fishing in the waters of Puget Sound during the month of September, 1901. It was shown that the respondent was a fisherman, and that it was his purpose, when he returned from Alaska, to engage in fishing in Puget Sound during the remainder of the fishing season; and this testimony was offered as a basis for estimating the damages sustained by him because of the delay of twenty-three days at Taku Harbor. It said that this evidence is too remote and conjectural to form a basis for estimating damages for that delay, and the case of *North American T. & T. Co. v. Morrison*, 178 U. S. 262 (20 Sup. Ct. 869), is cited as sustaining the contention. In that case it was held that the defendant, a transportation company, could not be held for wages which the plaintiff suggested he might have earned had the defendant fulfilled its contract and carried him to his place of destination at the time agreed upon. In the opinion stress was laid on the fact that the plaintiff had never been at the place where the company contracted to carry him; that he had no previous engagement or business there, or any promise of employment; that it was not shown what his occupation was, or what occupation he expected to follow at the point of destination. "The plaintiff was traveling to a land of

promise, hoping to there procure some occupation, he knew not what, or to engage in some business, he knew not what. The result of such an adventure cannot be foretold, and the plaintiff's anticipations afford no safe ground on which to base a claim for damages." In the case before us the conditions were different. Here the respondent had a fixed occupation, was the owner of appliances which enabled him to engage in that occupation, and was going to a place where employment at his particular occupation was certain. The amount of wages he might earn was, of course, uncertain, but wages of fishermen similarly situated furnished a test by which to determine the amount, and evidence of that character was admissible. *Ransberry v. North American T. & T. Co.*, 22 Wash. 476 (61 Pac. 154).

It is next objected that the verdict is not sustained by the evidence, in that it is too large. As we have shown, the verdict is in excess of the amount that the respondent was entitled to recover, because in excess of the amount claimed. Were this the only fault, however, we would not reverse the case because of it, but would remand it, with directions that the excess be remitted. But the respondent was permitted to recover for the wages of his helper at the rate of three dollars per day while detained at Taku Harbor, on the showing that the helper was a fisherman, and could have earned that sum by fishing in the waters of Puget Sound. This was error requiring reversal. The respondent could, of course, make such contract with his helper as he pleased, or pay him for his services such sum as he pleased; but when he sought to recover from the appellant for such services as a part of his damages he could recover only such sum as the services were reasonably worth, not what he paid or agreed to pay

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him nor what the helper might have earned elsewhere, unless these amounts were the reasonable value of such services. While there was evidence tending to show that the services of a helper were necessary in caring for the boat and gear while detained at Taku Harbor, there is no evidence which tends to show what such services were reasonably worth, and the verdict is, therefore, under the evidence, too large by the amount the jury may have allowed for the same.

Other errors assigned are disposed of by what has been said in the discussion of those specially mentioned. The judgment is reversed, and the cause remanded for a new trial.

MOUNT, DUNBAR and ANDERS, JJ., concur.

[No. 4372. Decided March 10, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. MICHAEL
SMITH, *Appellant*.

CRIMINAL LAW — SUFFICIENCY OF INFORMATION — GRAND LARCENY —
FAILURE TO CHARGE STEALING AS FELONIOUS.

An information charging grand larceny by alleging that defendant did "unlawfully steal, take, and carry away \$785.00," etc., states a crime within the definition of Bal. Code, § 7108, which defines grand larceny as the feloniously stealing, taking, and carrying away of the property of another of the value of thirty dollars or more, since the use of the word steal implies a felonious taking, and hence is sufficient, under Bal. Code, §§ 6849, 6850, 6851, which provide that words may be used in an indictment or information conveying the same meaning as those used in the statute to define the crime; that the indictment or information is sufficient if it can be understood therefrom that the crime charged is set forth in ordinary and concise language, in such a manner as to enable a person of common understanding to

know what is intended, and that matters formerly deemed defects should not affect the sufficiency of the information, when not tending to the prejudice of the substantial rights of the defendant.

Appeal from Superior Court, Ferry County.—Hon. CHARLES H. NEAL, Judge. Affirmed.

G. V. Alexander, for appellant.

M. E. Jesseph, Prosecuting Attorney, and *L. C. Jesseph*, for the State.

The opinion of the court was delivered by

MOUNT, J.—The appellant was convicted of the crime of grand larceny, and appeals from the judgment of conviction. The information, omitting the formal parts, was as follows:

“Comes now M. E. Jesseph, prosecuting attorney of Ferry county, state of Washington, and by this information accuses Michael Smith of the crime of grand larceny committed as follows: He, the said Michael Smith, on the 7th day of October, 1901, A. D., in the county of Ferry, state of Washington, then and there being, did then and there unlawfully steal, take and carry away \$785, lawful money of the United States, the same being gold and silver coin of the property of one Frank O'Brien, with intent to defraud him, said Frank O'Brien, of his property, contrary,” etc.

No demurrer was filed to this information. A plea of not guilty was entered, and a trial was had before a jury, which returned a verdict of guilty as charged. Motions for a new trial and in arrest of judgment were thereafter filed and denied by the court, and a judgment entered sentencing defendant to one year in the penitentiary.

The question presented by these motions and on this appeal is that the information does not state a crime be-

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cause the word "feloniously" does not appear in the information. The statutes defining grand and petit larceny in this state are as follows:

"§ 7108 [Bal. Code]. Every person who shall feloniously steal, take and carry, lead or drive away the personal goods or property of another, of the value of thirty dollars or more, shall be deemed guilty of grand larceny, and upon conviction thereof shall be imprisoned in the penitentiary not more than fourteen years nor less than six months.

"§ 7109. Every person who shall feloniously steal, take and carry, lead or drive away the personal goods or property of another, under the value of thirty dollars, shall be deemed guilty of petit larceny, and upon conviction thereof shall be punished by a fine not less than twenty-five dollars nor more than one hundred dollars, or be imprisoned in the county jail not more than one month, or by both fine and imprisonment, in the discretion of the court."

Grand larceny is thereby made a felony, while petit larceny is a misdemeanor. Bal. Code, § 6773. It will be noticed that the only difference between the crime of grand larceny and that of petit larceny, as defined by these statutes, is in the value of the property taken. The words "feloniously steal" appear in each. Under the common law and in states where the words "feloniously steal" appear in the definition of a crime, it is necessary to use the word "feloniously" in charging the crime. But the rule of the common law and the decisions of the courts of other states are of little use in determining the sufficiency of an information under our statute, which provides, at § 6849, Bal. Code, as follows:

"Words used in a statute to define a crime need not be strictly pursued in the indictment or information, but other words, conveying the same meaning, may be used."

"§ 6850. The indictment or information is sufficient if it can be understood therefrom,— . . . 6. That the act or omission charged as the crime is clearly and dis-

tinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. 7. That the act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case."

Under these statutes it is not necessary that the word "feloniously" should be used to define the crime of grand larceny, if other words conveying the same meaning are used instead. The word "feloniously" means "with intent to commit a crime." (Webster.) The word "steal" means "to take and carry away feloniously—without right or leave." (Webster.) It implies a felonious taking. As the words are used in this statute the word "feloniously" refers to the intention with which the stealing is done. When it is alleged that the defendant *unlawfully stole \$785, with intent to defraud the owner thereof*, the felony defined was sufficiently alleged to sustain a judgment after verdict. The information clearly and distinctly sets forth the facts charged as a crime in such manner as to enable a person of common understanding to know what was intended. Where no objections are taken to the information until after verdict, every reasonable intendment should be given in favor of the information. The statute upon this subject, at § 6851, Bal. Code, provides:

"No indictment or information is insufficient, nor can the trial, judgment, or other proceedings thereon be affected, by reason of any of the following matters, which were formerly deemed defects or imperfections: . . . 4. For any surplusage or repugnant allegation, or for any repetition, when there is sufficient matter alleged to indicate clearly the offense and the person charged; nor, 5. For any other matter which was formerly deemed a defect or imperfection, but which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

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The omission of the word "feloniously" was formerly deemed a defect, but its omission in this case did not tend to the prejudice of any substantial rights of the defendant.

The case was fairly tried upon its merits upon the theory that a felonious stealing was alleged, and the evidence was sufficient to sustain the verdict. The jury was fully instructed upon the character of proof necessary to constitute the crime, and the court, at the request of the defendant, instructed the jury that it must find a felonious taking and a felonious intent, and carefully and minutely defined the meaning of the words "felonious taking" and "felonious intent."

We think the judgment should be affirmed, and it is affirmed accordingly.

ANDERS AND DUNBAR, JJ., concur.

[No. 4556. Decided March 10, 1903.]

WILLIAM P. GILBERT, *Appellant*, v. D. G. WINDHUSEN,
Respondent.

RESULTING TRUST—AGREEMENT TO PURCHASE LAND.

Where two parties take a joint option for the purchase of land, and then determine not to buy, but, after the expiration of the option, one of them purchases the land in his own interest, the other has no right of action to have the purchaser declared a trustee for his benefit.

Appeal from Superior Court, Spokane County.—Hon.
GEORGE W. BELT, Judge. Affirmed.

Hamblen & Lund, for appellant.

John A. Peacock, for respondent.

The opinion of the court was delivered by

DUNBAR, J.— This action was instituted by the plaintiff to have defendant declared trustee for the benefit of plaintiff of an undivided one-fourth interest in eighteen sections of railroad land in Douglas county, Washington, upon payment of one-fourth of the purchase money; for a conveyance thereof; for a temporary injunction; and for an accounting of profits realized upon a re-sale. At the conclusion of plaintiff's case defendant moved to dismiss, because the facts proved do not entitle the plaintiff to any relief, which motion was granted, and a decree entered dismissing plaintiff's complaint, with costs. From a judgment of dismissal this appeal is taken, the appellant alleging that the court erred in sustaining the defendant's motion to dismiss plaintiff's complaint.

The record in this case is brief and simple, consisting of the testimony of the appellant and witnesses introduced in his behalf. The appellant, respondent, and one James H. Lefevre met Fruit, who was the owner of an interest in a railroad contract for the land described in the complaint, and obtained from him an option of a couple of days for the sale of said land. The option was paid, and the land examined. It had been agreed that, if the land suited the respondent, he would take a one-half interest in the same, and the appellant and Lefevre a one-fourth interest each. Upon the examination of the land, respondent was not satisfied with it, and so informed the appellant and Lefevre. He stated that he would not mind having one section of the land, but did not want the remainder at all. No other person being at hand to take his place, the matter was dropped, the time for which the option was taken expired, and Fruit, the owner of the land, was notified that the contract was at an end, appellant and Lefevre themselves refusing to pro-

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ceed with the purchase of the land. In a week or ten days from the time the announcement ~~was made that they would~~ not purchase the land, respondent sought to purchase of Fruit one section of the land, which he had before expressed a desire for. Finding that he could not obtain this section without paying about as much as for the whole amount of land, he concluded to purchase the whole of the land, and did so. After appellant learned that respondent had purchased the land he demanded an interest in accordance with the original proposition. The respondent refused to allow the appellant any interest in the land, and this suit was brought.

It was the view of the court that, after the option had expired, any of the parties had a perfect right to buy the land upon any terms they might see fit, and that no one had a right to complain. This, we think, was the only view of the matter which the court could have taken. Fruit testifies that he was informed by the parties that the deal was at an end, and that they did not want the property; that, before he made the contract of sale with respondent, he tried to sell to two or three different parties; that he was under no obligation to hold it for them or for any one; that he considered the deal off. This was, evidently, the view taken by all parties and it does not seem that there was anything to prevent the appellant and Lefevre from securing the land if they saw fit. In fact, it does not appear that the purchase was deemed by them particularly desirable until after the land had been sold to respondent. We think the record absolutely fails to show any interest in the land by appellant, and that the action was properly dismissed.

Affirmed.

FULLERTON, C. J., AND HADLEY, MOUNT AND ANDERS, JJ., concur.

[No. 4487. Decided March 13, 1903.]

JOSEPH DALY, *Appellant*, v. EVERETT PULP AND PAPER
COMPANY, *Respondent*.

PLEADING — AMENDMENT OF ANSWER — DISCRETION OF COURT.

Where plaintiff had actual notice of a motion to amend an answer, made on the day of trial, and no injury was shown as the result of the amendment, its allowance by the court was not reversible error, although not supported by affidavit nor notice of the application served on the plaintiff, as required by Bal. Code, § 4953, since the same section permits the allowance of amendments in the discretion of the court to correct mistakes, and there is nothing in the record negating the idea that the amendment was allowed for the purpose of correcting a mistake.

PARENT AND CHILD — INJURIES TO CHILD — ACTION BY FATHER — ESTOPPEL.

In an action by a father for loss of services of his minor son, resulting from injuries caused by defendant's negligence, it was not error to refuse to strike an answer averring that plaintiff had emancipated his minor son, so far as any claim for damages growing out of the alleged injuries was concerned, and had, with his own consent, advice, and assistance, permitted the son to bring an action in his own behalf for all damages, and that the father approved of the judgment entered in the action brought by the son, and, as the legal guardian of his son, received the money paid in satisfaction of such judgment.

SAME — EVIDENCE OF FORMER ACTION — ADMISSIBILITY OF PAROL.

In support of the defense of estoppel of a father to bring an action in his own name for personal injuries to a minor son, after participation in a suit and settlement in behalf of the son, parol testimony of the existence of the former suit and its settlement was admissible for the purpose of showing the father's participation therein; and the record of the son's suit was also admissible as one of the facts tending to establish the defense.

SAME — ESTOPPEL OF FATHER BY EMANCIPATION OF CHILD — CHALLENGE TO SUFFICIENCY OF EVIDENCE.

In an action by a father to recover for personal injuries to

31	252
33	463
31	252
34	577
31	252
37	226

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his minor son, the court was warranted in granting a challenge to the sufficiency of the evidence, where it appeared that the son had brought an action in his own name through his father as guardian *ad litem* for the same injuries, which did not limit the right of recovery merely to the period after majority of the son; that the father actively assisted in the bringing, conducting, and settlement of the suit, without reserving any right to make a demand in his own behalf; that as the legal guardian of his son he consented to, and accepted the fruits of, the judgment entered, which recited that defendant should be released from all liability whatsoever because of the injury suffered by the son, upon payment of the sum agreed upon as the amount of the judgment.

Appeal from Superior Court, Snohomish County.—
Hon. JOHN C. DENNEY, Judge. Affirmed.

Lewis & Hardin (Sherwood & Mansfield, of counsel),
for appellant.

Brownell & Coleman, for respondent.

The opinion of the court was delivered by

HADLEY, J.—This suit was brought by appellant against respondent to recover damages for the alleged loss of services of a minor son of appellant, occasioned by injuries to the fingers of said minor, received while working in the paper mill of respondent at Everett. Respondent answered the complaint, putting in issue the material allegations thereof, and affirmatively alleged, among other things, that theretofore said minor commenced an action against respondent in the superior court of Snohomish county to recover for all damages resulting from the injuries described in the complaint in this cause; that such proceedings were had in said suit that a judgment was entered therein against respondent by agreement, and with the approval and consent of appellant, for the sum of \$750, which judgment was to the effect that the respondent, upon paying

into the registry of the court the sum of \$750, should be released from all obligation and liability whatsoever because of any accident or injury consequent from any accident suffered by said minor as set forth in the complaint; that thereafter respondent did pay into the registry of the court, pursuant to and in satisfaction of said judgment, the sum of \$750, which amount was afterwards paid to appellant, as the guardian of said minor; that, by reason of the foregoing, appellant is estopped from recovering in this action. A trial was had before a jury. At the conclusion of the testimony, respondent challenged the sufficiency of the evidence, and moved the court to withdraw the case from the jury and enter judgment in favor of respondent. The challenge and motion were by the court granted. The plaintiff has appealed.

Many errors are assigned, but we do not find it necessary to discuss any except those which relate to the affirmative defense outlined above, since it is our view that the case must be determined upon the issue presented by that defense. It is urged as error that the court sustained respondent's motion for leave to file an amended answer which introduced the above mentioned defense. The motion was orally made, no affidavits were filed in support of it, and no notice of the same appears to have been given. Appellant contends that the granting of the motion was error, under the provisions of § 4953, Bal. Code, which provides, among other things, that the court may, upon affidavit showing good cause therefor, and after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding. The journal entry of the court shows that the motion was made upon the day the trial began. Appellant's counsel must have been present, since the entry shows that the motion was granted after hearing argument, and an exception was allowed to

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the appellant. There also appears in the record a motion of appellant to strike portions of the amended answer, which motion was made the same day. It is therefore manifest that appellant had actual notice of the presentation of the motion. While the latter portion of the section of the statute cited contemplates both notice and affidavit, yet the first portion of the section seems to give the court discretion to allow amendments to correct mistakes without requiring either. There is nothing in this record to negative the idea that the trial court may have permitted this amendment on the theory that it was to correct a mistake. This court has heretofore construed the statute as intending much liberality in the matter of amendments in furtherance of justice. In *Barnes v. Packwood*, 10 Wash. 50 (38 Pac. 857), three answers had already been filed, and at the time of the trial the court permitted a fourth to be filed. This court observed at page 52 as follows:

“ . . . the court having such a large discretion under our law and practice in matters of amendments, we do not think we would be justified in reversing the case for this reason.”

The record does not disclose any claim on the part of appellant that he was really injured by the amendment, and unprepared with testimony to meet any issue tendered thereby. No application for continuance of the trial on the ground of surprise or inability to produce testimony is shown. If such had been made to appear, no doubt, the trial court would have granted the amendment upon such terms as would have fully protected any rights shown to be jeopardized by permitting the amendment at that time. We think reversible error is not shown in permitting the amended answer to be filed.

It is assigned that the court erred in refusing to strike

certain paragraphs of the affirmative defense heretofore mentioned. This is urged on the ground that the defense presented by that portion of the amended answer is irrelevant and immaterial. We think the averments of that portion of the answer are material, and, if true, constitute a defense to this action. The answer is to the effect that appellant had emancipated his minor son, so far as any claim for damages growing out of the alleged injuries was concerned, and had, with his own consent, advice, and assistance, permitted the son to bring a former action in his own behalf for all damages occasioned by the injury. If the son, with the consent and assistance of the father, was permitted to collect all damages, including those occasioned by the reduced value of his services during minority, then it would seem to follow that the father waived his right to damages for reduced earning power during minority and gave them to the son. Such is the effect of the answer. Its averments are to the effect that the father approved of the settlement that was made, and the judgment that was entered in the former cause, and that the money was paid to him as the legally appointed guardian of the son. Such participation in that suit and settlement on the part of the father, we think, should now estop him from asserting a claim of his own, in the absence of an express understanding between appellant and respondent at the time of the settlement that he reserved his own right to a separate demand on account of reduced value of services until the son should reach his majority. For these reasons, we think the court did not err in refusing to strike from the amended answer.

It is urged that the court erred in overruling appellant's objection to the introduction of parol testimony to prove the contents of the record in the former case. The testimony referred to, however, was not admitted for the

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purpose assigned, but to show the knowledge of the appellant concerning the former suit and settlement, as well as his participation therein. For this purpose the testimony was competent. The contents of the former record were established by the introduction of the record itself. It was proper to show by parol testimony the participation of appellant in the former case, as bearing upon respondent's claim that he is thereby estopped in this action. The above reasons also apply to the further assignment that error was committed in admitting oral testimony concerning the settlement of the former case. That evidence was solely for the purpose of showing appellant's participation in the settlement, and was properly admitted.

The assignment that error was committed in permitting the introduction of the record of the former cause needs no discussion, in view of what has already been said. The existence of the record in that cause having been pleaded in the amended answer in connection with allegations as to appellant's knowledge thereof, it became proper evidence under the issue of estoppel.

It is urged that the court erred in granting the challenge to the sufficiency of the evidence, and in withdrawing the case from the jury and entering judgment for respondent. The evidence shows that the former suit, brought in behalf of the son through the guardian *ad litem*, was begun at the instance of the appellant. He consulted counsel, and arranged for the bringing of the suit, by assisting in placing the facts before the attorneys, and by an understanding between himself and counsel as to attorney's fees for the prosecution of the action. After the suit was brought, negotiations for a settlement were begun, concerning which appellant was, from time to time, consulted. These negotiations resulted in an agreement, authorized by appellant, that a judgment for \$750 should be entered in

the cause in full for all damages. When the terms of the agreed settlement were stated to the judge who entered the judgment, he asked appellant, as the father of the plaintiff in the cause, if the terms were satisfactory to him, and he responded in the affirmative. It is true, appellant is somewhat indefinite as to his recollection of just what did occur. He admits he was at the court house, but claims he did not know the judge. We think, however, that the testimony of the others who were present shows that, when the terms of settlement were stated to the judge, he asked appellant the question and received from him the response above indicated. Appellant also signed and verified a petition asking the court to appoint him as guardian of his son, in order that he might withdraw from the registry of the court the \$750 paid by respondent in pursuance of the settlement and judgment. He qualified as guardian, and receipted for the money, less the amount allowed by the court as counsel fees in the case. At no time does there appear to have been any indication by appellant of any reserved right to make a demand in his own behalf, but he actively participated in the suit and settlement thereof as above outlined. The complaint in the action brought in behalf of the son does not limit the demand for recovery to damages for reduced earning power after the period of minority, but it is general, and covers the whole of the remaining period of his natural life. The judgment entered contained the following:

“It is further ordered, adjudged and decreed that the above named defendant, upon paying to the clerk of this court the said sum of \$750, shall be released of and from all obligation or liability whatsoever because of any accident or injury consequent from any accident suffered by the plaintiff as set forth in the complaint herein.”

In view of appellant's participation in the suit, his con-

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sent to the judgment and his receipt of the fruits thereof as guardian for the son, we think he should not now be heard to say that he has a demand of his own which was not included in the above suit and judgment. It must be held that he emancipated his son, in so far as the right to recover damages was concerned, and permitted him to recover all damages accruing by reason of the accident, including those pertaining to the period of minority, as well as those relating to the time beyond minority. It is true that the earnings of a minor belong to the father unless the father has given them to him. But the father cannot recover for such earnings when he has emancipated the minor. That appellant is estopped to recover in this action is sustained by the case of *Baker v. Flint & P. M. R. R. Co.*, 91 Mich. 298 (16 L. R. A. 154, 51 N. W. 897, 30 Am. St. Rep. 471). That case seems to be directly in point here. The court, at page 305, observes as follows:

“It appears that the plaintiff in this case, as next friend of his son Oscar, took part in the trial of the former case, and insisted upon a recovery by his son for the very damage—that is, the value of the loss of Oscar’s services—which he now seeks to recover in the present case. It is undoubtedly true that as matter of law Oscar had no right in his suit to recover such damages without the consent of his father, but he did recover with the consent of his father; therefore the father is now estopped from setting up claim for the same damages in this action in his own name. It is true that the earnings of a minor son belong to the father, unless the father has given him his time and earnings; but the father could not recover for such earnings when he has emancipated him. *Shoenberg v. Voight*, 36 Mich. 310; *Allen v. Allen*, 60 Mich. 635; *Bell v. Bumpus*, 63 Mich. 375, 6 West. Rep. 130. If the case here had been for the earnings of the minor son, and it appeared that in a former action by the son—the father acting as his next friend—he had recovered the value of

his wages in such former suit with the consent of the father, that fact would be held tantamount to manumission of the infant, so far as that suit was concerned, and the father would be estopped from recovery of the same wages. There can be no distinction between such a case and the present; and the fact that the father appeared and prosecuted as next friend was tantamount to a relinquishment of such loss of services."

We think the application of the doctrine of estoppel as announced in the above case should be followed here. The court therefore did not err in granting the challenge to the sufficiency of the evidence, and in entering judgment for respondent.

The judgment is affirmed.

FULLERTON, C. J., and MOUNT, DUNBAR and ANDERS, JJ., concur.

[No. 4321. Decided March 14, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. W. R. CRAWFORD, *Appellant*.

HOMICIDE — SELF-DEFENSE — EVIDENCE — THREATS.

Where testimony as to a threat made by respondent is relevant, it is for the jury to determine whether or not it proves the fact for which it was introduced, and error could not be predicated on the court's refusal to strike it on the ground that the language testified to did not amount to a threat.

SAME — DYING DECLARATIONS — SURROUNDING CIRCUMSTANCES.

The circumstances under which a dying declaration was made affect its weight and credibility, and hence are admissible in evidence.

SAME — ABSENCE OF MALICE — FEAR OF DECEASED.

In a prosecution for murder, it was error to exclude testimony by the defendant as to whether he had any malicious feelings

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toward the deceased, and whether or not he was in fear of the deceased, since his feelings, motives or beliefs would be relevant to the issue of self-defense.

SAME — REPUTATION OF DECEASED.

The general reputation of the deceased as to going armed is admissible in evidence upon a trial for murder, where the defendant interposes the defense of justifiable homicide.

SAME — REBUTTAL — TESTIMONY OF WIFE AS TO DECEASED'S FIRE-ARMS.

In a prosecution for murder, testimony by the wife of the deceased as to the number and character of fire arms he owned, and whether he had any of them with him at the time of the affray, and also as to the time of day he reached home after being shot by defendant, was admissible for the purpose of tending to refute defendant's evidence offered in support of the claim of self-defense.

SAME — APPARENT DANGER — INSTRUCTIONS — CURING ERROR IN CHARGE.

A misstatement in an instruction to the effect that justifiable homicide is the killing of one who "manifestly intends" to commit a felony against the slayer, was cured by the subsequent charge in the same instruction that a person may act in self-defense when he in good faith, and as a reasonable man, has cause to believe that his life is in danger, whether the belief be founded on conditions which are real or only apparent.

Appeal from Superior Court, Kittitas County.—Hon. FRANK H. RUDKIN, Judge. Reversed.

Pruyn & Slemmons, for appellant.

Clyde V. Warner, Prosecuting Attorney, and *Austin Mires*, for the State.

The opinion of the court was delivered by

FULLERTON, C. J.—The appellant was charged with the crime of murder in the first degree for the killing of one G. V. Huhn, tried on the charge, and found guilty of manslaughter. He appeals from the judgment and sentence pronounced against him.

A witness on the part of the state was questioned as to a conversation he had with the appellant preceding the homicide, its purpose being to show threats made by the appellant against the deceased. One of the answers was as follows: "Well, he just simply said he had been down seeing Mr. Hayward—if he had given him the land the fence was on that Mr. Huhn had been cutting down—and he said he would go up, and, if he caught Huhn cutting the fence down, he would shoot him." The appellant moved to strike the answer on the ground that the language testified to did not amount to a threat, and assigns error on the refusal of the court to grant the motion. Conceding the contention of counsel as to the effect of the answer to be well taken, it would not be error on the part of the trial court to refuse to strike the answer out. There is no rule of law which requires a trial court to go through the testimony of each witness, and strike out and withdraw from the jury such of it as does not meet the expectations of the party introducing it. Its competency, relevancy, and materiality, are questions for the court, but whether it proves or disproves a particular fact is ordinarily a question within the peculiar province of the jury to determine. In the case before us, this character of testimony being relevant to the issue, whether the fact sought to be established by it was or was not proved by the testimony offered, was a question which the jury had the duty of solving from the testimony as a whole. The court was not called on to say whether particular answers did or did not prove the fact.

The dying declaration of the deceased was allowed to go to the jury, together with the circumstances under which it was made. It is objected that the court erred in permitting these surrounding circumstances to be detailed to the jury. There are cases which seem to sup-

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port this contention, but the weight of authority and the better reason, it seems to us, are the other way. The circumstances under which a dying declaration is made materially affect its weight and credibility, and as these are questions for the jury, it is proper that such circumstances should be shown. 10 Am. & Eng. Enc. Law (2d ed.), 387.

Objections were interposed and sustained to the following questions propounded to the appellant: "You may state whether or not you had any malicious feelings towards Mr. Huhn in his lifetime?" "Mr. Crawford, you may state whether or not you were in fear of this man?" "I will ask you if you knew the general reputation of the deceased, Huhn, in the community where he lived, in reference to his going armed?" The last question was also propounded to several of the appellant's witnesses, and objections thereto sustained. The prevailing rule is that whenever the motive, intention, or belief of a person is relevant to the issue, it is competent for such person to testify directly upon that point, whether he is a party to the suit or not. His testimony may be, and often is, entitled to but little weight, but this is no reason for its exclusion. He knows what his feelings, motives, or beliefs were at the particular time, and, when relevant to the issue, has the same right to testify regarding them as he has to any other relevant fact within his knowledge. It was error, therefore, to sustain the objections to the first and second questions quoted. In passing upon the last of the questions quoted, the court held it permissible to show what the fact was with reference to the deceased's going armed, but that it was incompetent to show what his general reputation in the community where he had lived was in that regard. A somewhat similar question was before this court in *State v. Ellis*, 30

Wash. 369 (70 Pac. 963), where it was held error to refuse to permit the defendant to show what the reputation and habit of the deceased was with reference to using firearms when engaged in quarrels. In that case it was said:

"It is readily perceived that the real issue at the trial was, did the facts as they appeared to the defendant at the time of the homicide justify an ordinarily prudent man in believing he was in imminent danger of death or serious bodily injury? If they so appeared to the defendant, he was excused for the commission of the homicide. The right of self-defense permits one to act honestly upon the apparent danger to which he is exposed at the time. It seems that evidence of the habit and reputation for carrying and using deadly weapons may be received where the nature of the defense indicates that the defendant had reasonable apprehensions of great danger to his person, and they are pertinent for the same reason that general reputation of bad character and threats uttered by the deceased are received. The rule is well stated in *Quesenberry v. State*, 3 Stew. & P., 308, as follows: 'If the killing took place under circumstances that could afford the slayer no reasonable grounds to believe himself in peril, he could derive no advantage from the general character of the deceased, for turbulence and revenge. But if the circumstances of the killing were such as to leave any doubt whether he had not been more actuated by the principle of self-preservation than that of malice, it would be proper to admit any testimony calculated to illustrate to the jury the motive by which he had been actuated.'"

The same principle governs here. The motive by which the defendant was actuated when he did the shooting was one of the principal questions at issue, and it was proper to show the reputation of the deceased as to his habit of carrying arms, to illustrate to the jury that motive.

It is urged that the court erred in permitting the wife of the deceased, over the objection of the appellant, to

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testify in rebuttal as to the time of day the deceased reached home after being wounded on the day of the affray; also as to the number and character of fire arms he owned, and whether he had them with him at the time of the affray. This evidence was material and competent, we think, in that it tended to refute the appellant's evidence offered in support of his claim of self-defense.

It is assigned that the court erred in refusing to withdraw from the consideration of the jury the question of murder in the first degree and murder in the second degree, and charging the jury that they might find the appellant guilty of either of these degrees of murder. This assignment is based upon the contention that the information charges no higher degree of crime than manslaughter. The information is, in form, substantially that suggested by Chief Justice GREENE in *Leonard v. Territory*, 2 Wash. T. 381 (7 Pac. 872), for charging murder in the first degree, and has been too many times approved by this court to be overthrown now on the ground of its insufficiency. See *State v. Cronin*, 20 Wash. 512 (56 Pac. 26), and cases there cited.

It is assigned that the court erred in giving the following instruction to the jury:

“On the law of self-defense, I charge you that justifiable homicide is the killing of a human being in the defense of one's person against one who manifestly intends, or endeavors by violence or surprise, to commit a felony against another. A bare fear of any of these appearances is not sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable man, and that the defendant acted under the influence of such fear. If you find from the testimony that the defendant was attacked by the deceased while in the lawful pursuit of his business, it was not necessary that he should retreat from the attack, but he had lawful right

to defend himself against the attack, and to judge of the necessity from the facts as they appeared to him at the time. And if he acted in good faith and as a reasonable man, and had good cause to believe that his life was in danger, or that he was about to receive great bodily harm at the hands of the deceased, and it could only be avoided by taking the life of the deceased, the defendant is not guilty, whether such danger was real or only apparent."

The objection is to the word "manifestly" in the first part of the instruction. It is said that a person has the right to act upon appearances, and may lawfully defend himself against one who apparently intends to inflict upon him a great bodily injury. Undoubtedly this is the rule, and, were the instruction limited to its first and second sentences, it would clearly be erroneous. But the concluding part makes the whole clear. It is there stated that a person may act when he in good faith, and as a reasonable man, has cause to believe that his life is in danger, whether the belief be founded on conditions which are real or only apparent. This is a correct statement of law.

For the errors noted, the judgment is reversed, and the cause remanded for a new trial.

MOUNT, ANDERS and DUNBAR, JJ., concur.

[No. 4481. Decided March 14, 1903.]

SECURITY SAVINGS SOCIETY, *Respondent*, v. SYLVESTER
COHALAN, *Appellant*.

APPEAL — EQUITABLE CAUSES — CORRECTION OF ERRORS WITHOUT
REVERSAL.

An equitable action triable *de novo* on appeal will not be reversed for error of the court in the conduct of the trial, when such error does not amount to the rejection of proper evidence,

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nor for error in the matter of findings, if the record is sufficient for the appellate court to correct them and direct a judgment accordingly.

ATTORNEY AND CLIENT — ASSIGNMENT OF CLIENT'S MORTGAGE TO CORPORATION — EFFECT OF ATTORNEY'S OWNERSHIP OF STOCK.

Where a stockholder of a corporation, while acting as attorney for a mortgagor, procures an assignment of the mortgage to his corporation at a large discount, his interest as stockholder is such that his client is entitled to the benefit of the transaction, and the corporation would not be entitled to foreclose for more than the amount of purchase price and taxes paid, with interest thereon, and a reasonable attorney's fee.

Appeal from Superior Court, Spokane County.—Hon. GEORGE W. BELT, Judge. Modified.

Gleeson & Stayt, for appellant.

Happy & Hindman, for respondent.

The opinion of the court was delivered by

MOUNT, J.—This is an action to foreclose a mortgage made by appellant to one P. C. Sorenson and by Sorenson assigned to the respondent. The complaint is in the usual form. Two defenses are interposed, viz.: (1) That the action is barred by the statute of limitations; and (2) "that the above named plaintiff procured the said note and mortgage and assignment thereof, if any such assignment was by them procured, fraudulently and for the purpose of cheating and defrauding this defendant out of his property by and through the agency of one P. C. Shine, who at all of said times was an attorney for and a stockholder of and acting in the capacity of agent and attorney for said plaintiff company, and who was at the same time acting in the capacity of attorney at law and legal counselor and adviser of this defendant in regard to the settlement and cancellation of said note and mortgage." These affirmative defenses were denied, the cause was tried, and findings

and decree rendered in favor of the plaintiff for the full amount prayed in the complaint. Defendant Cohalan appeals.

Three questions are argued in the briefs as follows: (1) That P. C. Shine, an attorney at law, who on a previous occasion had been employed as counsel for appellant, was permitted to sit by and suggest questions to respondent's attorneys in the trial of the case below; (2) that when the trial judge announced orally at the close of the trial that he would make certain findings, he had no authority thereafter to make other or different findings, to be filed with the clerk in writing; (3) "the assignment of the mortgage to plaintiff was a fraud on the rights of the defendant, Cohalan." The first two questions do not affect the merits of the case. If the lower court committed error in the respects claimed, this court will not reverse the case on that account, and send it back to be retried. The cause is tried in this court upon the record *de novo*. If error has not been made in the rejection of evidence, and if the record is sufficient for this court to determine the case upon its merits, we will do so; and, if the findings of the lower court are not correct, this court will correct them, and direct a judgment accordingly. The cause will not be reversed and remanded for the lower court to make or enter, proper findings, where the same can be done upon the record here.

This leaves for our consideration the third question argued. The evidence in the case is practically undisputed. No evidence was offered by appellant upon his alleged defenses. The facts appear to be substantially as follows: The note and mortgage were made on July 21, 1891. At that time appellant was indebted to Mr. Sorenson in about the sum of \$700. The note and mortgage were made for \$1,000 to cover future advances to equal

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that amount. No advances were subsequently made, except, possibly, small amounts to pay taxes on the mortgaged premises. The appellant made small payments on the note down to 1900, amounting in all to \$120. The note and mortgage were assigned by the mortgagee, on January 2, 1901, to the respondent corporation, for the sum of \$260. Prior to this assignment of the mortgage to respondent, appellant employed P. C. Shine, an attorney at law, to examine the title of appellant to the mortgaged property, to determine the amount of taxes due on the land, and to arrange some settlement of the mortgage in question. In accordance with this employment, Mr. Shine examined the title, determined the incumbrances against the property, and informed appellant thereof. Mr. Sorenson, the mortgagee, was at this time the holder of the mortgage in question. Appellant thereupon requested Mr. Shine to find some person to purchase the note and mortgage from Mr. Sorenson because appellant feared that Mr. Sorenson would foreclose the mortgage, and sell the mortgaged property. Mr. Shine at this time was a stockholder and director in the respondent corporation, and informed Mr. Cohalan, the appellant, that he thought he could get that company to purchase the mortgage. Mr. Shine thereupon wrote a letter to the mortgagee as follows:

“December 14, 1900.

“Mr. P. C. Sorenson, Cœur d’Alene, Idaho.

“Dear Sir:—Mr. Sylvester Cohalan has retained me to look after his business in regard to his homestead in section 24, 25, 44, upon which you seem to have a mortgage dated July 21, 1891, securing a note for \$1,000. Please call at my office at your earliest convenience with the mortgage and note with a view to the settlement of the same. Let me know by return mail when I may expect you. Yours very truly,

P. C. Shine.”

In response to this request Mr. Sorenson came to Mr. Shine's office, and agreed to sell the note and mortgage for \$260. Mr. Shine advised the respondent corporation that the security was good for that amount, and that the note and mortgage be purchased, which was accordingly done, and Mr. Sorenson assigned the note and mortgage to the respondent. Thereafter appellant came to Mr. Shine's office, and Mr. Shine testified:

"I told him that I had got the Security Savings Society to take up this mortgage from Sorenson, and that the society got an assignment of the mortgage, and had paid Sorenson for it, and I wanted him to execute a new note and mortgage to the society; and he said that it was entirely premature. And I told him that the Security Savings Society would give him the benefit of a heavy discount upon it, and, if he did not execute the mortgage and note, they would probably proceed for the whole amount; and he says, 'Has not Sorenson been paid?' and I says, 'Yes, but the note and mortgage has been assigned to the Savings Society'; and he says, 'If Mr. Sorenson has been paid, that is all I care for,' and he turned and went out."

Thereafter the respondent paid \$44.09 taxes due on the property, and brought suit for the full amount according to the face of the note, viz., \$1,848.85 principal and interest, \$44.09 taxes paid, and \$100 attorney's fees. -

There can be no doubt that if Mr. Shine, while acting as attorney for the mortgagor, had advanced his own money, and purchased the outstanding mortgage at a discount, he could not have foreclosed the mortgage against his client for any greater sum than he had actually paid, with interest from the date of the purchase. Weeks, Attorneys (2d ed.), § 265; *Baker v. Humphrey*, 101 U. S. 494. Mr. Shine was a stockholder and trustee in the corporation which he procured to purchase the mortgage. He was, therefore, a beneficiary in the purchase. His knowledge of

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the security and the purposes of the purchase was the knowledge of the purchaser. Weeks, Attorneys (2d ed.), §§ 265, 270. When it was shown, therefore, that Mr. Shine, or the company in which he was interested, had purchased the note and mortgage at a large discount, and that Mr. Shine at the time of the purchase was acting as attorney for the mortgagor, the court should have ordered the mortgage foreclosed for only the amount of the purchase money together with subsequent payment for taxes, with interest at the rate provided in the mortgage and a reasonable attorney's fee. This amount according to the evidence is \$304.09, with interest at 10 per cent. since January 2, 1901, \$100 attorney's fee, and the costs of the lower court.

The findings will be modified accordingly, and the cause remanded to the lower court to enter a judgment foreclosing the mortgage for the amounts last above named; appellant to recover the costs of this appeal only.

FULLERTON, C. J., and ANDERS and DUNBAR, JJ.,
concur.

[No. 4534. Decided March 14, 1903.]

JOSHUA PIERCE *et al.*, Appellants, v. ANGELO V. FAW-
CETT, Respondent.

APPEAL — NECESSITY FOR STATEMENT OF FACTS — QUESTIONS PRE-
SENTED BY RECORD.

An appeal will be dismissed because of the absence of a statement of facts, although the appellant seeks only the review of a question of law on the pleadings as to whether the action appeared therefrom to have been commenced in time, where the judgment of the court recites that the decision was based on other matters before the court as well as upon the application of the statute of limitations to the facts pleaded.

31	271
33	590
31	271
33	126
31	271
40	120

Appeal from Superior Court, Pierce County.—Hon. THAD HUSTON, Judge. Appeal dismissed.

Stiles & Doolittle, for appellants.

John C. Stallcup, for respondent.

PER CURIAM.—This is an action brought to recover upon a covenant of warranty, it being alleged that the grantors had no title to the tide land conveyed. The judgment was for respondent.

The respondent moves to dismiss the appeal herein for the reason that no statement of facts has been made or preserved, showing the evidence or any part thereof, and that the findings of fact justify the judgment of the court. It is contended by the appellants that no statement of facts is necessary, in that it is purely a question of law which is raised by this appeal, viz., the question of when the statute of limitations began to run. If this were true, as shown by the record, of course, no statement would be necessary; but, considering the pleadings and the findings of fact in this case, we do not feel warranted, in the absence of a statement of facts, in disturbing the judgment. The answer denies that the plaintiffs, their predecessors or grantors, were ever ousted or ejected from the premises, or any portion thereof, by the state of Washington or any one else, and alleges that the state of Washington has never asserted any claim against them, or their right and title in and to said premises; that defendant purchased from the state of Washington all right, title, claim and interest of said state in and to the said premises in the complaint described, and thereby protected the said plaintiffs against all claims of right, title, or interest in said premises, and tendered to the plaintiffs the benefit of said title. The court found, in addition to the finding that the action had not been commenced

in time, that in open court, upon the argument of the cause, the counsel for plaintiffs announced that plaintiffs were satisfied that they were not entitled to a rescission of the contract of sale created by said deed; that at the date of the execution and delivery of said deed, the title to the tide and overflow lands described in the complaint was in the United States of America, and that the constructive possession of the premises was in the United States at the time of the execution and delivery of the deed; that the defendant, Angelo V. Fawcett, did, subsequent to the commencement of this action, by contract, purchase from the state of Washington its claim of right in and to said land, and has made all the payments therefor in full; that no demand had ever been made upon plaintiffs or their grantors for any disclaimer or surrender of said premises, or any part thereof—and concludes as follows: "That for these and other reasons apparent, the said Angelo V. Fawcett is entitled to a judgment of dismissal, and for his costs and disbursements herein."

Considering the many questions raised in the pleadings in this case, and that the judgment of the court might have been warranted, even conceding that it erred in relation to the single question of the statute of limitations, we think that we would not be justified in disturbing the judgment, and that this case falls within the rule announced in *Johnson v. Spokane*, 29 Wash. 730 (70 Pac. 122). In that case the finding of the court was as follows:

"The above entitled cause having on the 15th day of June, 1901, come on regularly for hearing before the court and a jury duly impaneled and sworn, and the court having heretofore sustained a challenge to the legal sufficiency of the evidence disclosed to said jury by the opening statement of counsel for plaintiffs, and having sustained an objection to the introduction of any evidence by plaintiffs

for the reason that the defendant is entitled to judgment on the pleadings and on the opening statement of counsel for plaintiffs, . . . it is therefore ordered . . . that the above entitled action be, and the same is hereby, dismissed."

It was there held that, in the absence from the record of the opening statement upon which the court acted, this court would not be justified in reversing the cause; that all presumptions were in favor of the judgment; and that hence we could not conclude that the court erred in dismissing the cause upon the statement of counsel, without the opportunity of investigating that question, the record not having brought up the statement of the counsel in question. And so here, this court not being advised of what the reasons were that were apparent to the court why the defendant was entitled to judgment of dismissal, it is impossible to review them, and, in the absence of the record showing the contrary, the conclusion must be that they were good and sufficient reasons.

The motion will be sustained, and the cause dismissed.

[No. 4503. Decided March 16, 1903.]

ED. ANDERSON, *Respondent*, v. A. V. McDONALD, *Appellant*.

CONTRACTS — BREACH — NONSUIT.

In an action to recover for a breach of contract, a motion for nonsuit was properly denied, where it appeared that defendant had contracted with twelve laborers, as a partnership, for their services in excavating and tunneling along a railway line, that, upon a change in the route, six of the men quit work and refused to return, but that the others continued work under a new agreement whereby they were to receive a stated amount of cash for work done under the partnership contract and were to be paid

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days' wages for their future labor, and that defendant had committed a breach of such contract by refusing to make the cash payments, or to permit them to go on with the work after they had entered upon it under the new contract.

SAME.

Where a contract contemplates the making of cash payments for labor performed, the refusal to make such payments constitutes a breach, for which suit may be maintained.

SAME.

Where defendant, after entering into a contract for the services of plaintiff's assignors, and upon the performance of which they had entered, told them that he had taken charge of the work himself, that there was nothing more for them to do, and that he would not pay them another cent, his conduct amounted to a refusal to permit them to proceed, and constituted such a breach as to warrant a recovery for the amount unpaid for services rendered.

INSTRUCTIONS — HARMLESS ERROR — COMMENT ON FACTS.

Error of the court, if any, in referring to the facts in a case in charging a jury was cured by further instructions in which the jury were told that any reference made to the facts was not intended as an intimation of any opinion of the court, and that they were the sole judges of the facts in the case.

SAME.

An objection that an instruction excludes from the consideration of the jury one of the defenses of defendant, constitutes harmless error, where all the evidence introduced was submitted to the jury and their verdict was equivalent to an affirmative finding adversely to defendant's contention.

NEW TRIAL — IMPROPER VERDICT.

The fact that the jury gave a verdict for just one-half of the amount claimed in an action for work under a contract providing a stipulated rate of wages is not ground for new trial, where one of the issues in the case was the amount of time actually spent by plaintiff and his assignors upon the work, defendant claiming that a portion of the men were often intoxicated and thus incapacitated for doing their work.

Appeal from Superior Court, Whatcom County.—Hon. JEREMIAH NETERER, Judge. Affirmed.

Kerr & McCord, for appellant.

Ed. E. Hardin, for respondent.

The opinion of the court was delivered by

HADLEY, J.—The respondent, for himself and as the assignee of five other persons, brought this action against appellant to recover for amounts alleged to be due from appellant to respondent and his assignors on account of certain work done by them upon the construction of that portion of the line of the Seattle and Montana railroad commonly known as the "Chuckanut Cut-Off." The complaint alleges that appellant, as a contractor, had undertaken to perform certain constructive work along the line of said road, which included the approach and tunnel hereinafter mentioned; that respondent and his assignors entered into a verbal contract with appellant, whereby they undertook, at agreed prices, to excavate and construct an approach from a given point to a certain proposed tunnel as located by said railroad company, and also to bore, excavate, and construct as much of said tunnel as lies between said approach and the center of the tunnel; that they entered upon said work, and diligently prosecuted the same until on or about the 3d day of October, 1901, during which time they hired other men to assist in the work, for whose labor appellant paid upon the verbal request of respondent; that about said last-named day, the said railroad company, through its engineer in charge, changed the line of said road so that another and different approach to said tunnel was established, and which in large part required the abandonment of the approach as originally located; that on or about said day respondent and his assignors received knowledge of said change, and also that the relocation required the approach to be made much longer, deeper, and wider than that which they had under-

taken to construct; that the dangers attendant upon construction of the relocated line and prices for labor and cost per cubic yard required for constructing and excavating the same were much greater than those required upon the original line; that on said date respondent and his assignors entered into a verbal agreement with appellant, whereby it was mutually agreed that their contract first above mentioned should be terminated, and that the same was then abrogated; that, in consideration of said abrogation and mutual release of the parties from further obligations thereunder, it was further agreed that respondent and all of said assignors except one were each to continue to labor for appellant upon said relocated approach and in said tunnel until constructive work thereon was finished, and that appellant was to pay to each of the five who continued with the work \$2.50 per day for each day's labor of ten hours which they had theretofore performed under their former contract, and a like sum for each day's labor thereafter performed; that it was further agreed that the retiring one of respondent's assignors, who was not to continue with the future work, should be paid at the same rate for work he had already done; that each of said persons who had theretofore received money on account of the first contract should receive at that time the sum of \$25 cash, and each of those who had not theretofore received any money should then be paid \$50 cash, and that the remaining sums due for the prior work should be paid from time to time thereafter as the further work progressed; that in pursuance of the last-named contract respondent and the four others who had agreed to continue with the work entered thereon, and began to labor upon said approach to the tunnel, and continued so to labor under said contract until on and during the 4th day of October, 1901, at which time appellant refused to permit them to further labor under said con-

tract. The number of days' labor claimed to have been performed by those working under the two alleged contracts is set out, together with credits for board and certain payments, and the same is true of the one who worked only during the first period. It is alleged that appellant refused to pay the respective balances alleged to be due, and judgment is demanded in the aggregate for \$464.13. Appellant answered, admitting that he had a contract with the railroad company to perform certain work. He denies the making of the first contract as set out in the complaint, but alleges that he made a contract with a copartnership consisting of twelve persons, of which copartnership respondent and his assignors were members. The details of the contract he sets up are substantially the same as those alleged in the complaint, except as to the persons interested therein, with the further allegation that said contract was made subject to the general printed specifications of the railroad company, which provide that changes in the grade and location of the road may be made at any time upon the order of the engineer in charge. He denies the making of the last contract alleged in the complaint, and alleges overpayment for the work actually done, with a demand for judgment for the amount of such overpayment. The cause was tried before a jury, which resulted in a verdict for respondent in the sum of \$232.07. Appellant's motion for new trial was denied. Judgment was entered upon the verdict, and from said judgment he has appealed.

It is assigned that the court erred in refusing to grant a nonsuit. It is contended by appellant that his first contract was made with a partnership of twelve persons, and that the evidence of respondent did not establish the abrogation of that contract by the consent of all the members of said copartnership. There was evidence introduced by

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respondent to the effect that the colaborers of himself and his assignors worked with them until a change was made in the line of location, when all their said colaborers quit the work, refusing to consent to the change. It was also shown that appellant knew of this, and that said persons never returned to the work. Respondent and his assignors consented to the change, and continued with the work for some months afterwards, and until the said 3d day of October, 1901, when they also declined to proceed, because of another change in the line of location. Appellant knew of the retirement of the other men, and was advised of their reason for it. He, however, consented to the continuance of the work by those who remained, and for months gave his approval thereto. We think the evidence sufficiently showed, as against a motion for nonsuit, an abandonment by the men who left of all their interest in the first contract, and that their remaining associates were not precluded from making such a new contract with appellant as that alleged in the complaint. The terms of the alleged new contract were stated by several witnesses. We think the terms stated showed a new contract, based upon the consideration of mutual release from the terms of the first one, and also upon further consideration, that running to appellant being that the work should not be abandoned, but should be continued without delay, and that running to respondent and his associates being the promise of appellant to pay them at the rate of \$2.50 per day for both the prior and future work, together with certain cash payments. Such a contract entailed mutual obligations, contemplated benefits upon both sides, and was, therefore, based upon sufficient consideration. There was testimony to the effect that the printed specifications of the railroad company, which it is claimed require contractors to submit to changes in the line of location, were not made a part of

the first contract. There was also evidence as to the amounts claimed to be due, and that appellant had refused to make the cash payments, or to permit them to go on with the work after they had entered upon it under the new contract. Respondent's testimony, therefore, established a contract and a breach thereof as against a motion for nonsuit. The refusal to make the cash payments contemplated by the new contract was a breach for which suit could be brought within the rule announced by this court in *Arnott v. Spokane*, 6 Wash. 442 (33 Pac. 1063). At page 450, the court said:

"When the appellant failed to pay cash when due, according to the terms of the contract, the respondents were at liberty either to stop all work under the contract and sue for the recovery of the resulting damages, or to proceed with the work to completion, notwithstanding the breach."

A further breach was also sufficiently shown, as against a motion for nonsuit, by testimony that appellant refused to permit the work to proceed under the new contract after it had been begun. We think no error was committed in denying the motion for nonsuit.

It is assigned that the court erred in instructing the jury that, if they found that the respondent and his associates commenced to labor under the alleged new contract, and that appellant afterwards refused to permit them to proceed further, they should then find against appellant for the amount unpaid for work done under both contracts at the rate per day agreed upon in the new one. It is urged that this instruction was erroneous, for the reason that there was no evidence showing that appellant ever refused to permit the parties to proceed. We find testimony in the record to the effect that appellant told the parties that he had taken charge of the work himself; that he would

not pay them another cent, and that there was nothing more for them to do. We think such testimony was sufficient to authorize the above instruction. If such testimony was true, then appellant voluntarily put an end to the contract, and, having prevented the others from performing it, he is estopped to deny that they are damaged to the extent of the amount unpaid for services rendered. *United States v. Behan*, 110 U. S. 338 (4 Sup. Ct. 81).

Error is assigned upon an instruction which was to the effect that much evidence had been admitted concerning the old contract, and that the purpose thereof was to enable the jury to better understand the entire relations of the parties and the condition of their minds at the time the old contract is said to have been abrogated and the new one made. The objection to this instruction is urged upon the ground that it is a comment upon the evidence, and that it excluded from the consideration of the jury the affirmative defense wherein appellant claims that respondent and his assignors are indebted to him. We think the instruction is not susceptible to the criticism that it is a comment upon the facts, especially in view of other instructions in which the court told the jury that any reference made to the facts was not intended as an intimation of any opinion of the court as to the facts in the case, and that they were the sole judges thereof. Furthermore, we do not understand appellant to seriously contend that he has a right to recover over in this action under his said affirmative defense, but rather that it was interposed simply as a defense. In any event, the court submitted all the testimony thereunder to the jury, in order that they might consider it for the purpose of determining if a new contract was made. The jury, by its verdict, having found from all of the evidence that such new contract was made, no right of recovery over could rest in appellant. Such right would be inconsistent

with the terms of the new contract, which contemplated cash payments at once to respondent and his assignors, and also the future payment of other sums. Anything contained in the instruction we therefore think could be no more than harmless error in view of the jury's determination of what the facts were.

It is urged that error was committed in denying the motion for new trial. The verdict was for just half the amount demanded in the complaint. Appellant contends that, if respondent is entitled to recover at all, he is entitled to recover the full amount, and that the jury must have reached its verdict by some compromise agreement, or by resorting to chance of some kind. One of the issues in the case was, however, the amount of time actually spent by respondent and his associates upon the work. Appellant testified that a portion of the men were often intoxicated, and incapacitated for doing the work. Under that testimony we shall not undertake to say that the jury were not justified in reducing the time and in returning the verdict which they did. The jury heard the conflicting evidence, and passed upon it. Such being their province, we shall not, for mere conflict of evidence, disturb the verdict. *Herrman v. Great Northern Ry. Co.*, 27 Wash. 472 (68 Pac. 82, 57 L. R. A. 390); *Johnston v. McCart*, 24 Wash. 19 (63 Pac. 1121); *Swadling v. Barneson*, 21 Wash. 699 (59 Pac. 506). The record shows evidence upon which to found the verdict. The trial court heard the witnesses testify, and was better qualified than is this court to judge of the weight that might properly be accorded by the jury to the testimony of the several witnesses. We shall therefore not disturb the ruling upon the motion for a new trial.

The judgment is affirmed.

FULLERTON, C. J., and MOUNT, DUNBAR and ANDERS, JJ., concur.

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[No. 4544. Decided March 16, 1903.]

OLIVER W. SHEAD, *Appellant*, v. J. A. MOORE, *Respondent*.

APPEAL—REVIEW OF FINDINGS OF TRIAL COURT.

The supreme court is not bound by the findings of the trial court upon conflicting evidence, especially in a case where the greater part of the testimony is in the shape of depositions.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Reversed.

George E. Wright, for appellant.

Smith & Cole, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This action was brought by one of three joint makers of a promissory note against another maker to enforce contribution. The note was executed by the defendant J. A. Moore, together with George W. Grover and W. O. Grover. Upon its maturity it was paid by the estate of W. O. Grover, who had deceased since making the note. Plaintiff is the assignee of the estate of W. O. Grover. The complaint alleged the insolvency of George W. Grover, and demanded judgment against the defendant, Moore, for one-half the amount paid by the estate of W. O. Grover, together with interest. The answer alleged affirmatively as a defense that Moore signed the note as a surety only. The case was tried before the court, which, after hearing the testimony, found that the note was signed by the defendant as a surety only, without consideration, and dismissed the action, awarding costs to the respondent. Plaintiff excepted to

the findings of fact, and proposed findings to the effect that the defendant signed the note as a maker thereof, and for a valuable consideration moving to him, and from the action of the court in dismissing the cause this appeal is taken.

It is not necessary for the purposes of this opinion to enter into a history of the circumstances and conditions leading up to the making of this note. The testimony in the case is not very extensive, but is exceedingly contradictory, the defendant testifying positively that he signed the note as surety only, that he signed after both George W. Grover and W. O. Grover had signed, and that he placed his signature on the note above the other signatures for the reason that there was not room on the note to sign below the signatures of the Grovers. This testimony is in a measure corroborated by the deposition of witness Fogg. On the other hand, George W. Grover testified positively that defendant, Moore, signed the note first, that he himself signed next, and that W. O. Grover signed last; that W. O. Grover did not sign until he (George W. Grover) took the note from Boston, where he and Moore had signed it, to Beverly, several miles from Boston, where W. O. Grover resided; and that the said W. O. Grover, after noticing the names on the note, signed it without comment. This testimony comports with the face of the note.

It is insisted by the respondent that this court will be bound by the findings of the lower court. But, while the judgment of the trial court, who had opportunity to see the witnesses on the stand, will be given due consideration, it will not be controlling, and this court must, of necessity, weigh the testimony. Especially is this true where, as in this case, the greater part of the testimony is by depo-

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sition. The testimony of the two witnesses who were parties to the transaction being conflicting, such testimony will have to be considered in connection with other circumstances surrounding the case. While it is probably true that the location of a signature on a note does not determine whether it is the signature of a surety or maker, it is doubtless the common practice for the maker of a note to affix his signature to the note first, the signature of the surety following; and this is a circumstance to be considered in determining the status of the signers. Again, so far as this note indicates, all the parties are makers, and it is a joint and several note.

It is contended by the appellant that, when submitted to the test of a magnifying glass, it is plainly observable that the signature of Moore was written before that of the next signer, George W. Grover, it appearing that a portion of the capital "G", the first letter in the word "Grover", overlaps and spreads over the first letter of "o" in Moore's signature; and witnesses, who showed some experience in reading and detecting signatures and who were entirely disinterested, testified that the name Grover must necessarily have been written after the name Moore was written. It appears to us also, without any reasonable doubt, that such is the case. It is true, no doubt, that the chemical qualities of ink differ—that some inks fade and are absorbed sooner than others—so that we do not regard the appearance in that respect as absolute proof; but to our minds it is a strong indication, and a circumstance to be considered in the cause. As we have before indicated, the location of the signature is not conclusive of the legal responsibility of the signer; but the determination of the question in this case is important as affecting the credibility of the witnesses,

there being direct conflict in the testimony on this particular point. We think there is sufficient consideration shown by the whole record, and that the respondent has failed to overcome by clear and convincing testimony the presumption established by the face of the note that he is a maker for a consideration.

The judgment will therefore be reversed, and the cause remanded, with instructions to the lower court to grant the relief prayed for in the complaint.

FULLERTON, C. J., and HADLEY, ANDERS and MOUNT, JJ., concur.

[No. 4444. Decided March 17, 1903.]

O. LUND, *Appellant*, v. ST. PAUL, MINNEAPOLIS and
MANITOBA RAILWAY COMPANY, *Respondent*.

NUISANCE—OBSTRUCTION OF STREET—DELAY IN BUILDING BRIDGE—
ACTION FOR DAMAGES—INSTRUCTIONS.

Where a railroad company under authority delegated by a city closes a street for the purpose of building a new bridge across a stream, such obstruction of the street would not constitute a nuisance if not maintained for more than a reasonable time, and hence, in an action by a property owner to recover damages to his business and property on account of such obstruction, it was not error to charge the jury that it would be necessary for him to show want of care and diligence on the part of defendant.

SAME.

In such an action, an instruction to the effect that if the obstruction of the street was continued by reason of the failure of the steel company from which material had been ordered to furnish the necessary structural steel, and not because of lack of diligence on defendant's part, then plaintiff could not recover was proper where the evidence showed that the defendant had forwarded the work with dispatch, except that portion requiring

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the steel, and that it had promptly contracted with the best equipped company in the country to furnish the required steel, which was a kind not kept in stock, but must be manufactured according to plans submitted, and that the steel company had been delayed by strikes and labor troubles.

SAME.

A charge to the jury to ignore any statement of counsel as to the liability of the steel company to reimburse defendant for any sum it might be required to pay on account of the steel company's delay was proper, since the liability of the steel company could not be an issue in the action against defendant for creating a nuisance.

SAME.

A charge to the jury that defendant would be liable under the same circumstances as would make the city liable, was not erroneous by reason of failing to state under what circumstances the city would be liable, where the court had already, in another instruction, clearly stated the conditions which would make the city liable.

SAME—EVIDENCE—LOSS OF PROFITS.

The refusal to admit evidence showing plaintiff's receipts for a period of three months after the completion of the bridge, for the purpose of establishing by comparison the amount of his loss during the obstruction to travel, was not an abuse of the court's discretion in fixing the limit to be placed on the scope of such testimony.

SAME—WHAT ADMISSIBLE UNDER GENERAL DENIAL.

In an action based on defendant's negligence in failing to complete a bridge within a reasonable time, defendant was entitled, under the general denial, to introduce testimony as to the condition of the coal and steel markets, for the purpose of showing that the delay was occasioned by circumstances over which it had no control.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

Hamblen & Lund, for appellant.

Will H. Thompson and *M. J. Gordon*, for respondent.

The opinion of the court was delivered by

HADLEY, J.—The respondent railway company applied to the city council of the city of Spokane for leave to construct its line of railroad along and across certain streets and alleys of said city. An ordinance granting said privilege was passed and approved. Washington street, in said city, extends upon both sides of the Spokane river; the portions of the street separated by the river having been connected by a wooden bridge at the time of the passage of the ordinance above mentioned. By the terms of said ordinance a steel bridge was required to be constructed, and the plans called for certain changes in the grade of the street. The respondent entered upon the work of changing said grade and constructing said bridge as required by the ordinance. In the prosecution of the work, it became necessary to close up the street at the place where it crosses the river, and the traveling public were thereby prevented from crossing there. The street was a much-traveled one, and the work of construction upon the bridge occupied more than a year, during which time no travel was permitted to cross the river at that place. Appellant was the owner of real estate upon said street situate a short distance from the end of the bridge. The premises were, however, accessible from another direction. For a time before the street was closed at the bridge crossing appellant had been conducting a hotel, with bar-room attached, upon said premises. He claims that the interference with travel across the river upon that street greatly affected his business, and reduced the profits thereof, to his serious damage. He brought this suit to recover from respondent for such alleged damages. He alleges that by the exercise of reasonable and proper diligence in the making of said improvements the respondent

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might have constructed said bridge, and opened it for public use and travel, within three months from the time of commencing the work, and that said period of three months was a reasonable time within which to complete the same. He further alleges that, if said bridge had been constructed within a reasonable time, the profits of his business would have been at least \$20 per day greater; that in consequence of the unreasonable delay, travel was diverted from his premises; and that he has been damaged in the sum of \$5,000. The material allegations of the complaint are denied by the answer. A trial was had before a jury, which resulted in a verdict for respondent. Appellant moved for a new trial, which was denied. Judgment was entered upon the verdict that appellant take nothing by his suit, and from said judgment he has appealed.

Error is assigned upon certain instructions in relation to the question of reasonable time for the construction of the bridge. The criticism urged is that the case was submitted to the jury upon the theory that, in order for appellant to recover, it was necessary to show want of care and diligence on the part of respondent. It is insisted that such a theory is a wrong conception of the case, and that the real question is whether the facts concerning the street obstruction constituted a nuisance, and, if so, that respondent cannot be relieved from liability, though the work of construction may have been done in the most approved manner. It is further urged that the mere fact that injurious results were occasioned by the work is sufficient, if a nuisance existed, and that care on the part of respondent is not an element in the case. It appears to us that the theory of counsel and that of the court both lead to the same result. The city had the un-

doubted right to close the street for the purpose of building the bridge, and the obstruction occasioned thereby could not within a reasonable time have been classified as a nuisance. The city delegated the respondent company to make the improvement, and thereby vested it with authority to exercise the privileges belonging to the city in the premises. Therefore, as long as respondent exercised reasonable diligence, the obstruction could not constitute a nuisance. But, if want of care and diligence existed, then the obstruction was no longer a necessity, and became a nuisance. It follows that the instructions criticised correctly stated the law of the case.

It is assigned that the court erroneously instructed the jury to the effect that if the obstruction of the street was continued by reason of the failure of the steel company to furnish the necessary steel, and not because of any lack of diligence on respondent's part, then appellant could not recover. The evidence showed that respondent had promptly contracted with the American Bridge Company to furnish the structural steel required by the plans approved by the city for use in this bridge. That company was shown to be probably the best-equipped one in the entire country. The testimony was not contradicted that such material as was required for this bridge is not kept in stock by any company, but must be manufactured under special order, according to plans submitted. There was no showing in the evidence that the manufactured material could have been procured at an earlier date from any other source. There was also evidence to the effect that the delay of the manufacturing company was due to strikes and labor troubles, and that element was also made a feature of the instructions of the court in the connection now under consideration. The respondent had

been delegated by the city to do this work, and no time was specified within which it should be done. It was therefore under obligation to finish the structure within a reasonable time. It applied to probably the best recognized source for obtaining the manufactured material—a material which respondent itself was not prepared to manufacture, and which must have been known to the city at the time it delegated respondent to do the work. There was testimony that the work was forwarded with dispatch, with the exception of that portion thereof which required the steel, and that the delay was really due to the failure of that material to arrive. Appellant urges that respondent cannot be excused for any delay beyond the reasonable time required for the actual constructive work, and that the only excuse that can be offered for failure to perform a public duty must be the act of God or the public enemy. Such a harsh rule, applied to a case of this kind, cannot be the law. Appellant invokes the rule adopted in *Herrman v. Great Northern Ry. Co.*, 27 Wash. 472 (68 Pac. 82, 57 L. R. A. 390), which is to the effect that one cannot evade liability because of the neglect of another to whom certain duties have been delegated by him, for the reason that the primary liability rests with the one who has delegated the neglectful party. There, however, the duty neglected by the delegated party was such as, in its nature, could have been easily discharged by the one primarily liable, and the rule stated is reasonable and right in such cases. But here the respondent could not manufacture the steel, and was compelled to depend upon another, who was prepared for such skillful work. It is manifest, in the nature of things, that great expense and skillful preparation are required for such manufacture. The evidence shows that but few are thus engaged, and

it follows that those who wish the manufactured product may, without any neglect of their own, be delayed. Under such unusual and really compulsory conditions, liability should not be lodged against one who has himself been diligent. Such is the effect of the instructions criticized under this assignment of error. Respondent's obligation, as we have said, was to complete the work within a reasonable time, and what is a reasonable time must depend upon the circumstances of each particular case. In this case, under the evidence, the delay occasioned by the manufacturing company was an important circumstance.

"If it is proper to attempt any definition of the words reasonable time, that given by Chief Baron Pollock may be suggested, namely, that 'a reasonable time means, as soon as circumstances will permit.'" 2 Thompson, Trials, §1531.

The respondent stood in the place of the city, and we should inquire under what circumstances the city would have been liable.

"It may be stated as a general rule that if the legislature, acting within its constitutional limitations, directs or authorizes the doing of a particular thing, the doing of it in the authorized way and without negligence cannot be wrongful; if damage results as a consequence of its being done, it is *damnum absque injuria*, and no action will lie for it." 8 Am. & Eng. Enc. Law (2d ed.), p. 697.

The city, as a subdivision of the state, was empowered by the legislature to maintain streets and to erect bridges where required for necessary street purposes. That power in this instance was delegated to respondent, and the rule above stated as applicable to the city itself must apply to respondent. It is a recognized rule that the right of

transit in the use of a highway is subject to such incidental, temporary obstructions as necessity may require; and "these are not evasions of, but simply incidents to, or rather qualifications of, the right of transit; and the limitation upon them is, that they must not be *unnecessarily* and *unreasonably* interposed or prolonged." *Clark v. Fry*, 8 Ohio St. 358, 374 (72 Am. Dec. 590).

See, also, *Shepherd v. Baltimore & O. R. R. Co.*, 130 U. S. 426 (9 Sup. Ct. 598); *Coyne v. Mississippi, etc., Boom Co.*, 72 Minn. 533 (75 N. W. 748, 71 Am. St. Rep. 508, 41 L. R. A. 494); *Taylor v. Baltimore & O. R. R. Co.*, 33 W. Va. 39 (10 S. E. 29); *Stewart v. Havens*, 17 Neb. 211 (22 N. W. 419); 2 Thompson, Commentaries on Negligence, §1368.

Under the above authorities, the city itself would not have been liable if the work had been necessarily delayed without any neglect of its own, and if the delay had been solely due to the failure of the manufacturer to furnish material of such unusual character as the product of a limited field of manufacture. The same was true of respondent, and we think the instructions were not erroneous.

It is urged that the court erred in instructing the jury not to consider any statement of counsel relative to the liability of the American Bridge Company to reimburse respondent for any sum it may be required to pay on account of the delay occasioned by the bridge company. We think the instruction was correct. The bridge company was not a party to the case and the question of its liability to respondent was not an issue for the jury to consider. Moreover, the remarks of counsel upon this subject are not shown in the record, and we cannot say

that they may not have been such as warranted the instruction.

It is further assigned that error was committed in instructing the jury that the respondent would be liable under the same circumstances as would make the city liable, for the reason, as alleged, that the court failed to state under what circumstances the city would be liable. This assignment is not well taken, for the reason that in a previous instruction the court had clearly stated the conditions which would make the city liable. Under the well-known rule that all the instructions must be considered together, the particular instruction criticized was not erroneous.

Error is predicated upon the court's refusal to permit appellant to show the amount of receipts from his business for a period of more than three months after the completion of the bridge and the opening of the street. The purpose of this testimony was to endeavor to establish the amount of loss to appellant's business by comparison between the monthly receipts after the opening of the bridge and those during the time it was closed. It was not unreasonable that some limit should be placed upon the scope of that class of testimony. What that limitation should be, was largely a matter for the discretion of the trial court. Other influences than those arising directly from the opening of the street may have operated to affect the amount of receipts as time progressed. We think there was no manifest abuse of discretion.

Error is urged that the court permitted respondent to introduce testimony as to the condition of the steel and the coal markets, for the alleged reason that it was incompetent, under the answer, which was a general denial. That testimony tended to show that the delay was occa-

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sioned by circumstances over which respondent had no control, and therefore negatived the theory of negligence and want of care on its part. This may be done under the general denial, in an action based on negligence, which, as we have already said, this action was. 14 Enc. Pl. & Pr., 344.

The last error assigned is upon the denial of the motion for new trial. We find no error in the conduct of the trial, and, the jury having passed upon the evidence, the verdict will not be disturbed.

The judgment is affirmed.

MOUNT, DUNBAR and ANDERS, JJ., concur.

FULLEERTON, C. J., not sitting in this case.

[No. 4551. Decided March 17, 1903.]

MARY E. HARPEL, *Appellant*, v. ELMER J. HARPEL, *Respondent*.

APPEAL — STATEMENT OF FACTS — DELAY IN FILING — EXCUSE.

An order of the court granting an extension of time for the filing of a statement of facts, made without notice to the adverse party and in the absence of a stipulation for such extension, was improper, when the only excuse for the delay and the want of notice was the inability of the appellant to sooner raise funds for the prosecution of the appeal.

Appeal from Superior Court, Thurston County.—Hon. OLIVER V. LINN, Judge. Appeal dismissed.

Frank C. Owings, for appellant.

Troy & Falknor, for respondent.

PER CURIAM—This appeal is from an order of the lower court refusing to modify a decree of divorce so

as to change the custody of a son, now fifteen years of age, from the father to the mother, upon the ground that the mother, by reason of wealth and residence in the city, is more competent to have the custody of the son than the father, who resides in the country, and that the change of custody will be beneficial to the son. A motion is made to strike the statement of facts and dismiss the appeal. The order appealed from was entered on April 10, 1902. The last day upon which the statement could be filed without an extension of time was May 9, 1902. It was not filed or served until June 30, 1902. On this date an order was made extending the time sixty days, but this order was made without stipulation and without notice to respondent or his attorneys. At the time the application was made appellant's attorney filed an affidavit, in which it was stated, in substance, that appellant had been disappointed in raising money with which to prosecute the appeal, and that when she obtained the money there was not sufficient time within which to notify respondent's attorney of an application for an extension. We think this showing was entirely insufficient. No money was required to obtain an extension of time within which to file the statement. No showing was made to excuse the neglect to serve and file the motion for an extension within time, except that appellant was uncertain whether the appeal could be prosecuted on account of funds. This showing does not excuse the delay in serving the application for extension of time for filing the application. The case falls squarely within the rule of *Wollin v. Smith*, 27 Wash. 349 (67 Pac. 561) and *McQuesten v. Morrill*, 12 Wash. 335 (41 Pac. 56), and must be dismissed.

[No. 4342. Decided March 18, 1903.]

EMMA N. LAMONA, *Appellant*, v. M. M. COWLEY *Administrator, et al., Respondents.*

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435 406

APPEAL—STATEMENT OF FACTS—TIME OF FILING.

Where appeal is taken from a final judgment and also from an order denying a motion to vacate the same judgment, that portion of the statement of facts relating to the original judgment will be stricken from the record on appeal, when it was not filed within thirty days after the entry of such judgment, even if it was within thirty days from the entry of the order denying the motion to vacate.

WILL CONTEST—CONSTRUCTION OF COMPROMISE AGREEMENT.

Where a compromise of a will contest was entered into, whereby it was agreed that a certain daughter should have all the real estate standing in the name of deceased at the time of his death, "which said real estate is more particularly described in a quit-claim deed executed in conformity with this stipulation and agreement," such daughter is entitled to after discovered real estate in other counties, the record title to which was in the deceased at the time of his death, but which had not been described in the quit claim to her because unknown to both parties.

JUDGMENT—VACATION—GROUNDS—FINDINGS SIGNED IN ABSENCE OF ONE PARTY.

A motion to vacate a final judgment on the ground that the findings and conclusions were signed by the court in the absence of appellant's counsel was properly denied, where the findings and conclusions were served on appellant's attorneys before being presented to the court, and appellant was permitted to make exceptions to them, and was herself given an opportunity to submit findings and conclusions, which were denied.

Appeal from Superior Court, Spokane County.— Hon. GEORGE W. BELT, Judge. Affirmed.

Happy & Hindman, for appellant.

Merritt & Merritt and *Eugene Miller*, for respondents.

The opinion of the court was delivered by

MOUNT, J.—John Lamona died testate in Spokane county, on January 16, 1901, leaving a widow, Emma N. Lamona, the appellant; also a son and daughter by his first wife, and an adopted daughter. A contest was filed against the will and a compromise was agreed upon between the attorneys for the heirs and devisees of the estate. Subsequently this agreement was ratified by a contract which was substantially a copy of the agreement between the attorneys, signed by all the heirs and devisees of the estate. By this contract the property was to be divided among the heirs and devisees, and an administrator appointed to settle the estate, pay the debts and costs of administration, and distribute the property of the estate according to the terms of the agreement. This appeal is from the order of final distribution of the estate, and also from an order denying a motion to vacate the order of final distribution.

The order of final distribution was entered on April 23, 1902. Eight days thereafter the appellant filed a motion to vacate and set aside that order. On June 2, 1902, this motion was denied, and on June 5th the appellant gave notice of appeal from the order of final distribution, and also from the order denying the motion to vacate. Thereafter a bond on appeal was filed, perfecting the appeal. On June 19, 1902, a proposed statement of facts was filed in the cause. This proposed statement of facts contains the evidence taken on the hearing for final settlement of the estate, and also the affidavits filed at the hearing of the motion to vacate. The proposed statement, so far as it relates to the judgment of final distribution, was not filed until after the expiration of thirty days from the entry of the judgment, and no

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extension of time within which to file the proposed statement was asked, or granted by the court. A motion is made here to strike the statement because it was not filed within time. Under the rule announced in *Sturgiss v. Dart*, 23 Wash. 244 (62 Pac. 858), and *State ex rel. Dutch Miller Mining & Smelting Co. v. Superior Court*, 30 Wash. 43 (70 Pac. 102), this motion must be sustained, and that part of the statement relating to the trial upon the hearing for final distribution must be stricken.

This leaves in the statement of facts only the affidavits used on the motion to vacate. Two questions are left in the record for our determination: (1) The construction of the contract under which the estate was distributed; and (2) whether the motion to vacate was properly denied. The contract under which the estate was distributed provides as follows:

"It is further stipulated and agreed that said heirs shall make, execute and deliver quitclaim deed or deeds conveying the real estate, and quitclaiming all their right, title and interest as heirs, devisees or otherwise in and to all real estate conveyed to said widow subsequent to her marriage with said John H. Lamona, deceased, and title to which said real estate now appears of record to be in said widow, which said real estate is more particularly described in the quitclaim deed executed in conformity with this stipulation and agreement, which said deed is executed contemporaneously herewith by said heirs and said widow. It is further stipulated and agreed that said widow and Perry W. Lamona and Belle L. Lamona, his wife, Winifred Fruit and Price Fruit, her husband, shall make, execute and deliver to Alma E. Lamona, a quitclaim deed or deeds conveying the real estate, and quitclaiming all right, title and interest as widow, heirs, devisees or otherwise in and to all real estate conveyed to said John H. Lamona, deceased, during his life time, title to which appears of record at the time of his death

to be in said John H. Lamona, which said real estate is more particularly described in a quitclaim deed executed in conformity with this stipulation and agreement, which said deed is executed contemporaneously herewith by said widow, said Perry W. Lamona, Belle L. Lamona, his wife, Winifred Fruit and Price Fruit, her husband, to said Alma Lamona."

Subsequent to the making of this agreement and the execution of the deeds mentioned therein and to the appointment of an administrator of the estate, the title to certain real estate in Adams county and other places was discovered to be in the deceased at the time of his death; but deceased prior to his death had entered into contracts with persons who had agreed to purchase such real estate, and payments had been made on these agreements. Upon final settlement the question arose whether this property was the property of Alma E. Lamona, under the contract, or whether it was personal estate and should be divided equally between Alma E. Lamona and the widow. The lower court held that this property was real estate standing in the name of John H. Lamona, deceased, at the time of his death, and therefore was the property of Alma E. Lamona, and was distributed accordingly. The contract clearly provides that the widow shall have "*all real estate conveyed to said widow subsequent to her marriage with said John H. Lamona, deceased, and title to which said real estate now appears of record in said widow,*" and that Alma E. Lamona shall have *all the real estate standing in the name of deceased at the time of his death*. But appellant argues that, because of the provision "*which said real estate is more particularly described in a quitclaim deed executed in conformity with this stipulation and agreement,*" and because the real estate in question was not described therein, it was not intended to

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be included. There is much force in this argument. But when the stipulation of the attorneys as a basis of the contract is considered in connection with other clauses of the contract, it seems clear that it was not intended that the property described in the deeds executed at the time of the contract should be exclusive of other real estate which might thereafter be discovered. The stipulation of the attorneys upon which the contract was based provides:

"It is further agreed that said Emma N. Lamona [the widow and appellant here], Perry W. Lamona and wife, Price Fruit and wife, shall make, execute and deliver to Alma E. Lamona quit-claim deeds releasing and conveying to her all their right, title and interest as heirs, devisees or otherwise, in and to all real estate conveyed to the said John H. Lamona, subsequent to his marriage to the said Emma N. Lamona or prior thereto, title to which real estate appeared of record at the time of his death to be in said John H. Lamona."

The contract under consideration also provides:

"It is further stipulated and agreed that the parties hereto shall execute and deliver any instrument in writing which may now be, or which shall become, necessary to carry into effect the provisions in this stipulation and agreement, and that said parties hereto shall consent to the making of any order, judgment or decree of said above named court, which may be necessary or requisite to carry into effect and complete each and all, several and singular, the provisions contained herein."

The evident purpose of this paragraph, taken in connection with the stipulation of the attorneys upon which the contract was based, and in connection with the clauses from the contract above quoted, was to provide for property which was unknown or had been overlooked, or which might be discovered subsequent to the making of the

contract. We think the lower court properly construed the contract, and made proper distribution of the property under the terms thereof.

The motion to vacate the final judgment was made upon two grounds: (1) That the findings of fact and conclusions of law were signed by the court in the absence of appellant's counsel, without an opportunity to be present or to save exceptions to such findings; (2) that the attorney's fee allowed by the court was excessive. The record shows that the findings of fact and conclusions of law were served on appellant's attorneys before they were presented to the court to be signed, and also that appellant was subsequently permitted to submit findings and conclusions, which were denied, and was also allowed to make exceptions to the findings and conclusions theretofore signed by the court, and also to those refused by the court. If the judgment had been vacated for these purposes, appellant could not have had more in this respect than was given by the court. There is nothing in the record to show that the attorney's fee allowed by the court was excessive.

For these reasons, the judgment and order appealed from are affirmed.

FULLERTON, C. J., and ANDERS and DUNBAR, JJ., concur.

[No. 4268. Decided March 19, 1903.]

PAUL SCHULTZ, *Respondent*, v. W. H. HARRIS, *Appellant*.

TAXATION—FORECLOSURE OF DELINQUENCY CERTIFICATE—APPEAL—
DEPOSIT OF TAXES NECESSARY.

Under Laws 1897, p. 186, § 104, which provides that no appeal shall be allowed from the judgment upon foreclosure of certifi-

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cates for delinquent taxes, unless the party praying the appeal shall, before taking such appeal, deposit with the county treasurer an amount equal to the judgment and costs, an appeal by a delinquent taxpayer will be dismissed, where such deposit has not been made (*Meagher v. Hand*, 28 Wash. 332, distinguished).

Appeal from Superior Court, Pierce County.—Hon. THAD HUSTON, Judge. Appeal dismissed.

W. H. Harris, for appellant.

Fremont Campbell, for respondent.

PER CURIAM.— This action was brought under the statute to foreclose certain certificates of delinquent taxes, which certificates were issued by the treasurer of Pierce county to the respondent. The appellant interposed a demurrer to the complaint, which demurrer was overruled. He thereupon filed an answer alleging that the assessment upon which the taxes were levied was exorbitant, and, for various reasons therein alleged, was irregular, fraudulent, and void; that the respondent had no right to foreclose the certificate of delinquency, because he was not the legal owner thereof, and that the taxes for the years 1884, 1887, 1893, 1894, and 1895, were barred by the statute of limitations. He also pleaded a tender of the amount which he admitted to be due since 1894. The respondent demurred to the answer upon several grounds, and the lower court sustained his demurrer. The appellant refused to plead further, and a judgment was entered foreclosing the certificates of delinquency, and ordering a sale of the property upon which the taxes were levied.

Respondent moves to dismiss the appeal upon several grounds, one of which is that the appellant has not deposited with the county treasurer an amount of money equal to the amount of the judgment and costs. The mo-

tion upon this ground must be sustained. It affirmatively appears by the record that no deposit has been made with the county treasurer. The statute provides, at §104, Laws 1897, p. 186, as follows:

“Appeals from the judgment of the court may be taken to the supreme court at any time within six months after the rendition of said judgment, on the party praying an appeal executing a bond to the state of Washington, with two or more sureties to be approved by the court, in some reasonable amount to be fixed by the court, conditioned that the appellant will prosecute his said appeal with effect, and will pay the amount of any taxes, assessments, penalties, interest and costs which may finally be adjudged against the real estate involved in the appeal by any court having jurisdiction of the cause. But no appeal shall be allowed from any judgment for the sale of lands or lots for taxes, nor shall any writ of error to reverse such judgment operate as a supersedeas, unless the party praying such appeal, or desiring such a writ of error, shall, before taking such appeal, or suing out such a writ of error, deposit with the county treasurer an amount of money equal to the amount of the judgment and costs. . . .”

The statute is mandatory. It provides that no appeal shall be allowed unless the party praying the appeal shall, before taking such appeal, deposit with the county treasurer an amount equal to the judgment and costs. In *Meagher v. Hand*, 28 Wash. 332 (68 Pac. 892), we held that this statute did not apply where the appeal was taken by the certificate holder. But the case at bar is the reverse of that, and the statute must be held to apply here.

The appeal is therefore dismissed.

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[No. 4327. Decided March 19, 1903.]

THE STATE OF WASHINGTON, *Appellant*, v. JACOB SCHAFFER *et ux*, *Respondents*.

NUISANCE—MISDEMEANOR—JURISDICTION OF JUSTICE OF PEACE.

Under the jurisdiction given justices of the peace to punish misdemeanors, they have power to punish criminally persons guilty of the creation and maintenance of a nuisance, when made a misdemeanor, although justices have no jurisdiction of civil proceedings for the abatement of nuisances, because such action is especially enumerated by the constitution as being within the original jurisdiction of the superior court.

SAME—SUFFICIENCY OF COMPLAINT.

A complaint charging defendants with the creation and maintenance of a nuisance does not state facts sufficient to constitute a crime, either when it charges that the offense was committed some indefinite time in the past, without showing the acts as being within the period of limitations, or when it charges, in words of the present tense, without specifying the time as being before the filing of the complaint, that defendants are maintaining a nuisance.

Appeal from Superior Court, Asotin County.—Hon. CHESTER F. MILLER, Judge. Affirmed.

Walter Brooks, Prosecuting Attorney, and *Ben F. Tweedy*, for the State.

Sturdevant & Bailey and *C. H. Baldwin*, for respondents.

The opinion of the court was delivered by

FULLERTON, C. J.—The respondents were arrested on a warrant issued out of a justice's court on a complaint purporting to charge them with the offense of creating and maintaining a nuisance. They demurred to the complaint on the grounds, first, that the justice's court had no juris-

diction of the subject matter of the offense; and, second, that the complaint did not state facts sufficient to constitute a crime. The demurrer was overruled by the justice, and a trial had on the merits of the action; resulting in a judgment and sentence to the effect that the respondents pay a fine of a fixed sum, and that the nuisance be abated. The respondents appealed to the superior court from the judgment and sentence, and there again urged the demurrer interposed in the justice's court. This demurrer the superior court sustained, and entered a judgment dismissing the proceedings. The state appeals from the judgment of the superior court.

Taking up the question of jurisdiction first, we are clear that a justice's court has no jurisdiction to abate a nuisance, and that the justice's judgment, in so far as it directed the nuisance which it found the respondents were maintaining to be abated, was a nullity. By § 6 of art. 4 of the state constitution, actions to prevent and abate a nuisance are specially enumerated as being within the original jurisdiction of the superior court. By § 10 of the same article, power is granted to the legislature to prescribe by law the powers, duties, and jurisdiction of justices of the peace, with the limitation that the jurisdiction granted shall not trench upon the jurisdiction of the superior courts. This limitation, we held in *Moore v. Perrott*, 2 Wash. 1 (25 Pac. 906), prohibited the legislature from granting to justices of the peace jurisdiction over causes which had been specially enumerated as being within the original jurisdiction of the superior court. In that case we said:

"The language of the constitution is not that the superior courts shall have exclusive jurisdiction, but it gives to the superior courts universal original jurisdiction, leav-

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ing the legislature to carve out from that jurisdiction the jurisdiction of the justices of the peace, and any other inferior courts that may be created. Thus, justices of the peace may be given exclusive original jurisdiction in cases where the demand or value of property in controversy is not \$100, in cases of misdemeanor, and of other special cases and proceedings not otherwise provided for or specially enumerated as within the jurisdiction of the superior courts. It is the enumeration of the particular matters which are within the original jurisdiction of the superior courts, which we interpret to mean that those matters pertain to them exclusively. The language is not the clearest that could have been used; but, unless it is so interpreted, there can be no possible force in the restriction placed upon the legislature in its power to confer jurisdiction upon justices of the peace; for, if the minor courts can have concurrent jurisdiction with the superior courts up to \$300, there is not a syllable in the constitution to prevent them from having it to any amount. This is certainly not to be conceded."

But while actions to prevent and abate a nuisance are specially enumerated, so as to fall within the exclusive original jurisdiction of the superior courts, actions to punish for a misdemeanor are not; and unless it is said that an action to punish criminally for the creation and maintenance of a nuisance is an action to prevent or abate a nuisance within the meaning of these terms as used in the constitution, then there is no prohibition against vesting in justice's courts power to punish the creation and maintenance of a nuisance as a misdemeanor. We cannot think an action to punish criminally for the creation or maintenance of a nuisance is in any sense an action to prevent or abate a nuisance. Doubtless the fact that such acts are punishable criminally has a deterrent effect on those who might otherwise create or maintain a nuisance, still it operates against the person, punishing him for the commis-

sion of the act, and has nothing to do with the nuisance itself; the judgment being satisfied when the sentence imposed is executed. The action named in the constitution is clearly a civil action directed against the nuisance itself, the judgment in which either forbids the creation of the nuisance, or directs the abatement of a nuisance already created. The action operates primarily against the thing, not against the person, and the judgment therein is satisfied by forbearing to do the thing forbidden, or performing the act directed to be performed. The power to prevent and abate a nuisance being in no way dependent on the fact whether the creation or maintenance of a nuisance be punishable criminally or not, it exists independent of and regardless of that fact. We see no reason, therefore, why the legislature may not make the act of creating or maintaining a nuisance a misdemeanor, and vest justices of the peace with jurisdiction to punish for the offense. The justice's court, then, while it was without jurisdiction to enter a judgment abating the nuisance, had jurisdiction to punish the acts of creating and maintaining the nuisance as a misdemeanor. And as the justice's court had such jurisdiction, the superior court acquired jurisdiction for the same purpose by the appeal of the respondents; and it is necessary, therefore, to inquire whether the complaint states facts sufficient to constitute a misdemeanor.

The charging part of the complaint is in the following language:

"The undersigned, being first duly sworn, upon his oath, says: That the above named defendants, towit, Jacob Schaffer and Katie Schaffer, have caused and suffered the heads, stomachs and entrails of dead animals to decay and rot on lot five (5) of Block S of the official plat of Vineland, Asotin county, and state of Washington,

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now on record in the auditor's office at Asotin, in said county and state, platted and recorded by the Lewiston Water & Power Company; and the said defendants have caused and suffered filth and noisome substances to be deposited on the said real estate, and have caused and suffered the said filth and noisome substances to remain on the said real estate, to the prejudice of their neighbors and people living in the immediate neighborhood, to wit: more than thirty families, and to people travelling upon the highways, passing by and along the said real estate; and the said defendants will continue to cause and suffer the said filth and noisome substances to be deposited and remain on the said real estate, if the said nuisance be not abated, to the prejudice of their said neighbors and people, and those travelling on the said highways, running by and along and past the said real estate; and the defendants maintain and use a slaughter house on the said real estate, and the said business of slaughtering animals is carried on on the said real estate; and the said defendants are husband and wife and are a community, and as such maintain the business of slaughtering animals on the said real estate and in the said slaughter-house, and also keep and feed hogs, cattle, sheep and fowls, on the said real estate; and by doing, maintaining and engaging in the said business of feeding and keeping the said animals and fowls and slaughtering animals on the said real estate, and keeping and maintaining the said slaughter-house and using it as a slaughter-house, the defendants cause and occasion obnoxious exhalations and offensive smells, which are offensive and dangerous to the health of the said thirty families, living in the said immediate neighborhood of the said real estate, and which are offensive and dangerous to the health of the public; and the said defendants will continue the use of the said slaughter-house and the said real estate in the way and manner aforesaid, and will continue to occasion the said obnoxious exhalations and offensive smells by continuing the said nuisance. The title to the said real estate is in the name of Katie Schaffer, the wife of the other said defendant, and the said real estate

and slaughter-house is under the full and complete control of the defendants, and the defendants refuse, upon demand, to abate the said nuisance alleged in this information, and before the commencement of this action it was demanded of the defendants that they abate the said nuisance. The defendants will continue the nuisance described in this information. The said slaughter-house and the said real estate are situated in a thickly settled community, and the thirty families aforesaid are living within three-quarters of a mile from the said slaughter-house and real estate described in this information. All of which is done, caused, and suffered, maintained by defendants; contrary to the statutes of the state of Washington and especially against and contrary to the 3085 and 3084 sections of Ballinger's annotated codes and Statutes of Washington, Vol. 1, and against the peace and dignity of the state of Washington."

The objection to the complaint is that no time is laid when the offense attempted to be charged was committed. If the complaint be analyzed, it can be gathered therefrom that the respondents did, at some time in the past, commit acts which constituted a nuisance; that they were at the time of the filing of the complaint maintaining a nuisance (that is to say, they are charged, in words of the present tense, with maintaining a nuisance); and that they will continue to maintain a nuisance in the future. The latter part of the charge need not be further considered. The statute provides a punishment only for an offense committed, not for the intent to commit an offense. So the charge that the respondents did at some past time create and maintain a nuisance, needs no special consideration to show its insufficiency. It is essential, under the Code (§ 6850, Ballinger's) to allege facts sufficient to show that the acts committed which constituted the crime were committed within the time limited by law for the commencement of an action therefor. Here no such facts are

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alleged. There is not even an allegation that the acts committed constituting the nuisance continued from some time past to the present time. The acts are wholly in the past, but at what time in the past the complaint does not state. Was it sufficient to lay the time of the offense as that of the filing of the complaint? Mr. Wharton says that time and place must be attached to every material fact averred, and to assign the day as that of the finding of the bill, unless it be specifically averred that the offense was before the finding, is bad. Wharton, *Criminal Pleading & Practice*, §120. In Wisconsin it is held that an indictment which charges the crime to have been committed on the day the indictment is found is sufficient, when words are used indicating that the crime was prior to the finding, though it be not specifically alleged—as that the defendant “did unlawfully vend and sell,” etc., implying that the offense had been already committed. But even there it was conceded that the indictment must show in some manner that the offense was prior to the finding. *State v. Emmett*, 23 Wis. 632. Such, also, seems to be the rule in California. *People v. Squires*, 99 Cal. 327 (33 Pac. 1092). So the statute (Bal. Code, §6850) provides that an indictment or information shall be sufficient if it can be understood therefrom that the crime was committed at some time previous to the finding of the indictment or the filing of the information, and within the time limited by law for the commencement of an action therefor—at least a negative way of stating that it will be insufficient if the time is not laid as previous to the finding of the indictment or information. Tested by the most liberal of these rules, the complaint is insufficient. The words used to denote time are in the present tense. The effect of the charge is that the respondents are now committing

the acts complained of (that is, they were committing them at the time the complaint was filed), but whether they had committed them before that time, and within the statute of limitations, is not charged.

The judgment is affirmed.

MOUNT, ANDERS and DUNBAR, JJ., concur.

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22	87

[No. 4350. Decided March 19, 1903.]

LUCY W. HEWITT *et al.*, Respondents, v. M. A. Root *et al.*, Appellants.

APPEALABLE ORDER—OVERRULING MOTION TO QUASH EXECUTION.

An order overruling a motion to quash a writ of execution is appealable, under the provisions of Bal. Code, § 6500, which allow appeal from any final order made after judgment which affects a substantial right.

APPEAL—TIME FOR TAKING.

Under the statutory rule for the computation of time, an appeal taken on the fifteenth day after the entry of an order appealed from was in time, where there was a fifteen day limitation on the right of appeal in such cases.

SAME—DISMISSAL—CESSATION OF CONTROVERSY.

An appeal from an order refusing to quash a writ of execution will not be dismissed on the ground of a cessation of the controversy because of the fact that the court afterward sustained objections to the confirmation of the sale under such execution, where the order refusing to confirm was a general one, not specifying any of the several grounds upon which it was rested, and where there was nothing to raise a presumption that the objections were sustained on a ground that would bar a resale under the writ.

JUDGMENTS—EXPIRATION OF LIEN.

A judgment becomes dormant under the statutes of this state, at the end of five years from the date of its rendition, and will not, until it is revived, support an execution.

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Appeal from Superior Court, Thurston County.—Hon. OLIVER V. LINN, Judge. . Reversed.

Vance & Mitchell and *Root, Palmer & Brown*, for appellants.

J. W. Robinson, for respondents.

The opinion of the court was delivered by

FULLERTON, C. J.—On February 24, 1896, the respondents recovered a judgment against the appellants in the superior court of Thurston county on a promissory note. Shortly thereafter execution was issued on the judgment, and certain property of the appellants sold, and the proceeds credited on the judgment, leaving a balance still due thereon. On January 15, 1902, more than five years after the entry of the judgment, the respondents caused another execution to be issued, under which the sheriff of Thurston county levied on certain other property of the appellants and proceeded to sell the same as prescribed by law. Thereafter, on February 26, 1902, prior to the sale of the property levied upon, the appellants moved in the court issuing the writ to quash the same, and all proceedings thereunder, for the reason, among others, that more than five years had elapsed since the entry of the judgment, and the same had not been revived or continued. The motion was overruled by the trial court, and this appeal is from the order entered thereon.

The respondents move to dismiss the appeal on the grounds (1) that the order appealed from is not an appealable order; (2) that the appeal was not taken within the statutory time; and (3) that the controversy between the parties has ceased to exist. No brief is filed by the respondents on the merits.

By statute (Bal. Code, §6500) an appeal is allowed from any final order made after judgment which affects a substantial right. The order appealed from, it seems to us, is such an order. The trial court had jurisdiction to determine the question whether or not an execution could lawfully issue upon the judgment, and the practice adopted to bring the question before that court has the sanction of modern authority. 8 Enc. Pl. & Pr. 460. The order, therefore, is one within the court's jurisdiction to pronounce, has the force and effect of a judgment, and is conclusive of the matters determined by it, as between the parties, so long as it stands on the records of the court not vacated or reversed. As such it is appealable. See *Otis Bros. & Co. v. Nash*, 26 Wash. 39 (66 Pac. 111); *Sturgiss v. Dart*, 23 Wash. 244 (62 Pac. 858); 2 Cyc. 601.

The appeal was taken on the fifteenth day after the order appealed from was entered. This was in time, even though it be held that the shorter limitation applies to appeals from orders of this kind. Under the rule of the statute for estimating time—excluding the first day and including the last—the appellant had the whole of that day in which to serve his appeal notice.

After the sheriff's return of sale had been filed, the appellants filed objections thereto on various grounds, some of which went to the validity of the writ, and others to the regularity of the proceedings. A general order was entered sustaining the objections. The respondents have caused to be certified to this court a copy of the objections, and the court's order sustaining them, and insist that this order is in effect an order sustaining the motion to quash the information, and for that reason grants to the appellants all the relief asked, and all they

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will obtain should this court sustain this appeal and reverse the order appealed from; that there is therefore no longer a controversy between the parties, and under the rule adopted by this court in *State v. Wickersham*, 16 Wash. 161 (47 Pac. 421); *Hice v. Orr*, 16 Wash. 163 (47 Pac. 424), and their subsequent kindred cases, the appeal should be dismissed. Assuming that the result contended for would follow, did the record show that the trial court sustained the objection to the confirmation of sale on the ground that no lawful writ could issue on the judgment, it does not follow that such must be the result from the order as made. The order refusing to confirm the sale was, as we say, a general order. It did not specify the ground or grounds on which it was rested. As the objections filed contained several grounds, any one of which, if found to be true, would sustain the order, but some of which would allow a resale of the property, there is no conclusive presumption that the objections were sustained on a ground that would bar a resale under the writ. *Marble Savings Bank v. Williams*, 23 Wash. 766 (63 Pac. 511). This is not enough to entitle a respondent to dismiss the appeal on the ground that the controversy has ceased to exist. It is not enough to show a probability that the controversy has ceased. The showing that such is the fact must be clear and certain. *Wood v. Seattle*, 23 Wash. 1 (62 Pac. 135, 52 L. R. A. 369). The motion to dismiss must be denied.

On the merits of the controversy but one question is suggested; viz., can a writ of execution lawfully issue on a judgment after five years from its rendition? Speaking on this question in *Brier v. Traders' National Bank*, 24 Wash. 695 (64 Pac. 831), this court, through Judge

WHITE, after reviewing the statutes relative to the revival of judgments, said:

"It would seem that at the end of five years from its rendition a judgment ceased to be effective for any purpose; no real estate of the judgment debtor was bound for its satisfaction, and no execution could be issued thereon. The owner of such dead or expired judgment might revive it. While the language in the first part of §462, *supra*, is 'the lien thereof may be revived and continued,' §463, *supra*, declares that the order of the court 'shall operate as a revival of the judgment for the amount found due at the time of such revival, and the same [that is, the revived judgment] shall be and continue a lien upon real estate of the judgment debtor for a period of five years from and after the date of such order, in like manner with the original judgment.' It is not the mere lien that is revived; it is the judgment itself, and the lien as an incident of the revived judgment, if a certified copy is filed with the auditor, becomes operative in the same manner as if it was an original judgment."

In *Packwood v. Briggs*, 25 Wash. 530 (65 Pac. 846), we held that an execution sale was void, which took place after the end of the five-year period, although the execution was issued while the judgment was still a lien. To the same effect is *Hardin v. Day*, 29 Wash. 664 (70 Pac. 118). These cases are decisive of the question suggested. They, in effect, hold that a judgment becomes dormant at the end of five years from the date of its rendition, and will not, until it is revived, support an execution. It follows, therefore, that an execution could not lawfully issue on the judgment in question here.

The order appealed from is reversed, and the cause remanded, with instructions to enter an order quashing the writ.

MOUNT, DUNBAR and ANDERS, JJ., concur.

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[No. 4389. Decided March 19, 1903.]

JACOB HAYTON *et ux.*, *Appellants*, v. JULES BEASON,
Respondent.

JUDGMENT—LIMITATION ON REVIVAL.

Where a motion for the revival of a judgment was made just before the expiration of the six year limitation thereon, but notice thereof was not served on the adverse party until nearly two years thereafter, the judgment could not be revived, under Laws 1891, p. 165, which provides that no judgment shall be revived unless proceedings therefor shall be commenced within six years after the date of its rendition, inasmuch as the procedure did not follow the statute in force governing the commencement of actions and, in case of the inapplicability of that statute, the service did not follow upon the suing out of the writ within such a reasonable time as to constitute one continuous transaction.

Appeal from Superior Court, Skagit County.—Hon.
GEORGE A. JOINER, Judge. Affirmed.

Million & Houser, for appellants.

Smith & Coleman, for respondent.

The opinion of the court was delivered by

FULLERTON, C. J.—On March 28, 1894, the appellants recovered a judgment against the respondent in the superior court of Skagit county for the sum of \$256.50 and costs of action. The judgment remaining unpaid, the appellants on the 27th of March, 1900, filed their motion in the superior court in which the judgment was rendered to revive and continue the lien of the same, and caused the clerk of the court to issue a notice, citing the judgment debtor to appear and show cause why the motion should not be granted. On February 21, 1902, the

sheriff of Skagit county served the notice on the respondent in the manner required by law for the service of a summons. Thereafter the respondent appeared and moved to dismiss the proceedings for the alleged reason that the same were not commenced within the time limited by law. The motion was sustained by the trial court, and judgment entered accordingly. This appeal is from that judgment.

The act (2 Hill's Code, §§462-463) permitting judgments to be revived by motion and notice, as originally enacted, did not limit the time within which proceedings therefor should be commenced; nor did it limit the time within which the notice must be served after filing the motion. With reference to the former the provision was that such proceedings might be commenced at the end of five years after the date of rendition of the judgment, and with reference to the latter, that "At any time after filing such motion, the party may cause notice to be served on the judgment debtor in like manner and with like effect as a summons." In 1891 (Session Laws 1891, p. 165) the legislature amended the act by providing that no judgment should be revived or continued unless proceedings for such revival or continuance should be commenced within six years after the date of its rendition, but did not define what should be deemed a commencement of the action. By reference to the dates above given, it will be noticed that the motion to revive was filed and the notice to the judgment debtor issued by the clerk on the last day of the six-year period, while the service of the notice was had on the judgment debtor nearly two years thereafter. The question here is, therefore, was the proceeding commenced by the filing of the motion to revive the judgment? In our opinion, it was not, no matter whether the

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general statute relating to the commencement of actions is to be held applicable thereto, or whether it is to be governed by the general rules of law. The statute in force at the time the judgment was rendered provided that an action was commenced by the service of summons. Session Laws 1893, p. 407. That in force at the time the motion to revive was filed provided that an action was commenced by the service of a summons, or by filing a complaint with the county clerk, as clerk of court, and causing the summons to be served within ninety days thereafter. As the notice was not served until nearly two years after the motion was filed, the proceedings were not commenced under these general statutes, no matter which of them may be held to apply to the particular case. Where it is not otherwise provided by statute, the general rule is that an action is commenced when the process required to bring the defendant into court is sued out, provided it is followed by the usual and ordinary proceedings with reference to its service, and served within a reasonable time. In other words, the suing out of the writ, and the proceedings leading up to its service, as well as its actual service, must be so connected as to reasonably constitute a continuing single transaction. See 1 Cyc. 747, and cases collected. In a case, therefore, where it should so happen that the statute of limitations completed its course between the time the writ was sued out and the time it was served, it was not held to be a bar if it was reasonably made to appear that the service succeeded the suing out of the writ in the ordinary course of events, without unusual or unnecessary delay. But the case before us is not such a case. While the process was sued out in time to be within the statute, it was not served within such time thereafter as to enable the court

to say that the suing out of the writ and its service was a continuous transaction. The delay was for an unusual time, and the record offers nothing to explain or excuse it, being but a bare recital of the facts.

The appellants argue, however, that the act itself excuses the delay, or, perhaps better, especially sanctions it in that it provides that the notice may be served at any time after the motion to revive is filed. But the question is not, was the delay so unreasonable as to cause a proceeding properly commenced to lapse? but is, rather, was the proceeding ever properly commenced? The statute relied upon offers no solution for this question. It might be that a delay between the filing of the motion and the service of the notice, longer than is allowed by the general statutes between the filing of the complaint and the service of the summons, would not be fatal to the proceedings, if both occurred before the statute of limitations had run; but as the law requires that the proceedings be commenced within a given time, and further requires that service of notice be had in order to commence the proceedings, the service must precede the expiration of the given time, if the bar of time is to be escaped.

The judgment is affirmed.

ANDERS, MOUNT and DUNBAR, JJ., concur.

[No. 4403. Decided March 19, 1903.]

JOHN T. HUETTER, *Respondent*, v. WILLIAM W. REDHEAD, *Appellant*.

MECHANICS' LIENS — FORECLOSURE — RESCISSION OF BUILDING CONTRACT — SUBSEQUENT ASSIGNMENT — RIGHTS OF ASSIGNEE.

A building contract was abandoned by mutual consent of the parties, owing to the insolvency of the builder, and a lien was filed on the building for what was due the contractor. The

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premises were sold by the owner to another, to whom he assigned the building contract. The assignee demanded that the contractor proceed with the building, and upon his refusal, the assignee finished the building at his own cost. *Held*, in an action for the foreclosure of the contractor's lien, that the assignee could not apply the sum expended in the completion of the building against the claim of the contractor, as the building contract had provided, since that contract had in fact been rescinded prior to its assignment.

SAME—AMOUNT DUE—CONTRACT PRICE—SUFFICIENCY OF EVIDENCE.

In an action to enforce a mechanic's lien for labor and material put into a building prior to the rescission of a building contract, the testimony of the superintending architect that on the date of the rescission he made an estimate of all the work done and materials furnished and put into the building and that the reasonable value thereof according to the contract price was \$15,193, to which should be added certain extras worth \$689.28, for which plaintiff was entitled under the contract, was sufficient evidence, uncontradicted, to show that the estimate of the work done was based upon the contract price and not upon the *quantum meruit*.

SAME—INTEREST.

The allowance of interest prior to the date of a lien notice was erroneous, where the lien notice did not claim interest, and the complaint for foreclosure of the lien asked for interest only from the date of filing the notice.

Appeal from Superior Court, Spokane County.—Hon. GEORGE W. BELT, Judge. Modified and affirmed.

Crow & Williams, for appellant.

F. T. Post, for respondent.

The opinion of the court was delivered by

MOUNT, J.—This is an action to foreclose a mechanic's lien. Findings and a decree were made in the court below in favor of the plaintiff for the sum of \$3,260.15, with interest from February 8, 1900, for attorney's fees and costs. From this decree the defendant appeals.

The facts are substantially as follows: On August 31, 1899, the respondent entered into a contract with the

George Spaulding Company, Limited, a corporation, to erect a four-story warehouse for the sum of \$18,920. The contract is the usual builder's contract, and among other things provides that the building should be completed on or before December 1, 1899, and "payments to be made every two weeks as the work progresses, on estimates of the superintending architect, 85 per cent. of the amount of labor and materials actually placed in the building. Final payment to be made within ten days after the contract is fulfilled." On November 23, 1899, on account of extra work amounting to \$395.78, the time of completing the building was extended twenty-one days. Thereafter, on December 28, 1899, the building not being completed, the respondent and the George Spaulding Company, Limited, entered into the following contract:

"It is hereby agreed between said parties that the original contract shall be in full force and effect until the entire contract is completed, and that this instrument shall be a part and parcel of said contract. Said party of the first part hereby agrees and promises: (1) To stop all *brick work* on said building immediately; (2) to take proper care of all materials now upon the premises and which are yet to be delivered; (3) to protect all portions of the work effectually against the action of the elements, as directed by the superintendent; (4) to commence the work within three days after receiving written notice from the superintendent; (5) to waive all claims for additional compensation on account of suspension of work; (6) to keep the surety bond in force until the contract is completed. Said parties of the second part hereby agree: (1) To pay for the following materials: For 80,081 feet of lumber now on the premises, \$720; for iron work now on the premises, \$245; for mill work, \$200; 33,786 feet of lumber yet to be delivered, \$274.07; 175,000 brick, \$1,268.75. 85 per cent. to be paid every two weeks on brick delivered; balance of 15 per cent. thirty days

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after all the brick have been delivered. 78,000 feet seasoned flooring \$936, to be paid for in six weeks. (2) To extend the time for completion of the building to June 1, 1900."

This contract did not call for a cessation of work on the building, and respondent kept men at work on the inside thereof doing carpenter work, and also kept teams hauling material. Thereafter, on January 2, 1900, an estimate of labor and materials, amounting to \$2,230, was made by the superintendent, and given to respondent. This estimate was not paid when it was presented to the Spaulding Company, but was subsequently paid on June 29, 1900. On February 8, 1900, another estimate for \$282 was made, and given to respondent, which estimate has not yet been paid. The total amount paid to respondent upon the contract is \$12,632. When the certificate of estimate above named, for \$2,230, was presented to the Spaulding Company for payment, the respondent was informed that the company was insolvent, had no money, and could not pay the estimate. Several conferences were had thereafter between respondent and the Spaulding Company and the superintending architect. The result of these conferences was that the respondent notified the Spaulding Company and the superintendent that, unless the amount due were paid, he could not finish the building, and that the contract would be void. This was assented to by the Spaulding Company, and on February 28, 1900, all work was stopped on the building. Subsequently, on the 18th day of April, 1900, the claim of lien sought to be foreclosed in this action was filed against the property for \$4,200. On the 13th day of April, 1900, the Spaulding Company agreed to sell all their interest in the uncompleted building to the appellant, and on the 26th of April duly assigned the contract with the respondent to

appellant without the consent of respondent. Appellant, at the time of the purchase of the property, knew all the facts above stated, which had occurred prior to the purchase thereof, and also that respondent claimed "something over \$3,000 for work he had done on the building, which had not been paid for." After appellant purchased the building, and the contract had been assigned to him, he caused a written notice to be served on respondent, requiring him to proceed to finish the building according to the contract. Appellant also notified respondent that he was ready to go ahead with the construction of the building, and take up the estimates which had not been paid, and tendered respondent a check for \$671, which respondent refused. Respondent also refused to carry out the contract. Appellant thereupon proceeded to finish the building at a cost of \$6,256.19.

It is argued by appellant that the respondent was in duty bound to finish the building under the terms of the contract, and that, upon his refusal to do so after notice by appellant, appellant was at liberty to proceed under the terms of the contract, finish the building in accordance with the plans and specifications, and charge the same up to the contractor, and account to him only for the balance due, after deducting the cost thereof, and payments already made from the contract price. This argument is based on the assumption that the contract between appellant and respondent was still in force after assignment by the Spaulding Company. We think the evidence in this case clearly shows that prior to the assignment the contract between respondent and the Spaulding Company had been rescinded and abandoned by mutual consent of the Spaulding Company and respondent, and therefore that respondent was not bound to proceed with the

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contract at the time of the assignment. This being true, the appellant was in the same position as his assignor, and could not revive the contract without the consent of the respondent, which was never given. Appellant's argument on this question must, therefore, fail.

The question to be determined, then, is what amount was due the respondent upon the work done at the time the contract was rescinded. It is contended by appellant that the amount found due by the lower court was based upon the *quantum meruit*, and not upon the contract price of the labor and material already in the building. The superintending architect testified that on February 8, 1900, he made an estimate of all the work done and materials furnished and put into the building, and that "the reasonable value thereof according to the contract price was \$15,193;" that in addition to this sum there was an item of \$389.28 for extras, and \$245 for iron work on the premises, and \$65, the agreed price of a platform which had not been included in his estimates; making a total of \$15,892.28. We think this evidence is sufficient to show that the estimate of the work done was according to the contract price, even if the rule is as is contended for by the appellant, viz., that the amount of his recovery must be based upon the contract price of the labor and materials actually in the building at the time the contract was rescinded. There is no other evidence in the record tending to show that the work was of less value than the estimate made by the superintending architect above quoted, except that there was evidence to the effect that the price of labor and materials had increased in value at the time the respondent ceased work. But this fact does not aid appellant, because the estimates were not based on this increase of price, but

were based on the cost of labor and materials before the increase in value thereof. So that, whether the estimates were based on the contract price or on the reasonable value at the time the work was done, the result would be practically the same, and that is probably what the superintending architect meant when he said the reasonable value according to the contract price was \$15,193, with the addition of the extra work. It is conceded that the payments made prior to the rescission amounted to \$12,632. The evidence shows that at the time of the rescission the labor and materials furnished according to the contract price amounted to \$15,892.28. There is practically no dispute as to this amount. The difference between these amounts, viz., \$3,260.28, must be the sum due the respondent at the time of the rescission. This is substantially the amount found by the lower court.

Appellant also contends that interest should not have been allowed from February 8, 1900. In this, we think, the appellant is correct. In the lien notice no claim was made for interest. In the complaint no claim was made for interest prior to April 18, 1900, the date of the filing of the lien. Where no claim is made for interest by the lien notice prior to the date thereof, and where the prayer of the complaint is for interest from the date of the lien, we think interest should not be allowed prior to that date.

The decree will be modified to this extent: that interest at the legal rate will be allowed on the amount found due, viz., \$3,260.15, from April 18, 1900. In all other respects the decree is affirmed; neither party to recover costs on this appeal.

FULLERTON, C. J., and ANDERS and DUNBAR, JJ., concur.

[No. 4492. Decided March 19, 1903.]

BARNET M. WHITING *et ux.*, *Appellants*, v. C. H. DOUGHTON *et ux.*, *Respondents*.

VENDOR AND PURCHASER—RIGHT OF FORFEITURE—WAIVER BY PAROL.

The time of performance of a written contract for the sale of land, although of the essence thereof, may be waived by subsequent oral agreement.

SAME—ESTOPPEL.

Where the purchaser of land has been led to believe from the conduct of the vendor that a right given under the contract to declare a forfeiture has been waived, the vendor will be estopped from enforcing forfeiture.

SAME—DEFAULT IN INSTALLMENTS—RIGHTS OF PURCHASER.

After waiver of the vendor's right of forfeiture, by reason of failure in payments the purchaser would not be in default until after demand upon him for payment of the installments due and the lapse of a reasonable time in which to meet the demand.

SAME—CONTRACT BY HUSBAND ALONE—RATIFICATION BY WIFE.

A wife who joins with her husband in an action for the cancellation of a contract for the sale of land and for a forfeiture of payments made thereunder, thereby ratifies the contract, though made by the husband alone for land in which each owns an undivided half interest as separate property.

APPEAL—RESPONDENT NOT ENTITLED TO REVERSAL.

Although the record on appeal from a judgment dismissing an action may show that defendants were entitled to affirmative relief, the judgment will be allowed to stand unreversed, where the defendants have not appealed.

Appeal from Superior Court, Spokane County.—Hon. GEORGE W. BELT, Judge. Affirmed.

Merritt & Merritt, for appellants.

J. W. Marshall, for respondents.

The opinion of the court was delivered by

HADLEY, J.—The appellants are husband and wife. On the 24th day of April, 1900, appellant Barnet M. Whiting executed a written contract for the sale of certain real estate in the city of Spokane, to respondent C. H. Doughton. The latter joined in the execution of the contract for himself and also acting in behalf of his co-respondent, Sarah E. Doughton, who is his wife, although she was not named in the contract and did not sign it. Appellant Barnet M. Whiting was the owner of an undivided half only of the real estate, the same being his separate property. His wife and co-appellant, Matilda Whiting, was the separate owner of the other undivided half. Appellant Matilda Whiting did not join in the execution of the written contract, which, by its terms, purported to be an agreement to sell and convey the entire title. By the terms of the contract respondents were to pay \$275 for the property. One hundred dollars of said sum was paid at the time the contract was made, and the remaining \$175 was to be paid as follows: \$10 on the 25th day of May, 1900, and \$10 on the 25th day of each succeeding month until the amount was fully paid, together with interest thereon at the rate of eight per cent. per annum from date until paid. Time was made of the essence of the agreement, and it was also provided that, in the event of default on the part of respondents in any of the conditions, they should forfeit the payments already made. In addition to the aforesaid \$100 payment, the amounts due on the 25th days of May and June, 1900, respectively, were paid, and thereafter no more payments were made until the 13th day of the following September, when the sum of \$100 was paid. The last-named payment covered the delinquent install-

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ments and all amounts to mature until the 25th day of May, 1901, and appellant Barnet M. Whiting gave a receipt in writing therefor. At the time the contract was made, respondents were placed in possession of the property, and they thereafter erected a house thereon, which has since been occupied by them. Such possession, erection of improvements, and occupancy were with the knowledge, consent, and acquiescence of appellant Barnet M. Whiting, and during all the time appellant Matilda Whiting had actual knowledge thereof. No payment was made after the one of September 13, 1900, and according to the terms of the written contract another was due May 25, 1901. No demand was made for payment, and on August 10, 1901, appellant Barnet M. Whiting notified respondents that they were in default, that the contract was canceled, and that he would receive no more payments. Thereafter, on January 1, 1902, this suit was brought by appellants, whereby they seek the cancellation of said contract, and forfeiture to them of all payments made, and judgment for possession and quieting title in them. Respondents, in their answer, aver that appellant Barnet M. Whiting represented himself to be the owner of the land, and that they relied thereon in all that they did; that appellants allowed the installments for July and August, 1900, to pass uncollected when due, and thereafter accepted the same, and eight months' additional installments in advance; that at the time the last-named payment was made said Barnet M. Whiting agreed with respondents that they could make the payments of the balance of the purchase price whenever convenient, and that no advantage would be taken of the forfeiture clause in the contract; and that appellants then waived and abandoned the said forfeiture clause by virtue of their said agreement. It is

alleged that appellants conspired to cheat and defraud respondents by their course of conduct. Respondents brought into court with their answer the sum of \$67.80, and tendered it as the full balance due under the contract. They pray judgment that their rights have not been forfeited, that they are entitled to the possession of the land, and to a deed therefor. A trial was had before the court without a jury, and resulted in a judgment dismissing the action, and awarding costs to the respondents. From said judgment the plaintiffs have appealed.

There is no statement of facts in the record, and much of what we have stated above has been gathered from the court's findings, and must be treated as conclusive facts in the case. The court further found that appellant Barnet M. Whiting and respondent C. H. Doughton had a conversation regarding further payments, in which said Whiting told said Doughton that the remaining payments could be made at any time when convenient, and that no advantage would be taken of respondents in the matter of payments. This conversation the court finds was at a time prior to any default under the contract and that respondents relied upon it. It is further found that because of appellants' conduct respondents were led to believe that no advantage would be taken of the forfeiture clause, and because of that fact, and relying thereon, respondents did not make their payments for the amounts maturing after May 25, 1901, to which date the last \$100 payment had covered all installments. The court concluded as matter of law that appellants, by their conduct in dealing with respondents and accepting payments, waived the forfeiture clause, and that by reason thereof they could not put respondents in default without having first demanded payment of the money remaining unpaid,

and giving respondents a reasonable time thereafter in which to perform. Error is assigned upon this conclusion of law. It is insisted that an extension of the time of payment or any change in the conditions of the contract must have been in writing, and that there must have been a consideration. It will not be urged that when appellant accepted payment of the two months' installments already past due they did not thereby waive the forfeiture clause as to those payments at least. Furthermore, when that waiver was made the payment of eight months' additional installments in advance at the same time may well have been regarded as a consideration for waiving past as well as future delay in payments. Moreover, a written receipt was given at the time that payment was made. Just what it contained does not appear. But sufficient does appear to show that it must stand as written evidence of at least a partial waiver of the forfeiture provision of the contract. It is true, a written agreement may not be varied by contemporaneous oral agreements alleged to have been made at the same time. This principle is based upon the theory that the parties are supposed to have included in the writing their full agreement as made at the time the writing was drawn and signed. But this does not preclude a modification thereof orally made at a subsequent time, when the parties may, by new agreement, mutually assent to such modification.

"The time performance of a written contract may be waived as well as extended by parol. 1 Beach, Modern Law of Contracts, § 781.

Fraud and conspiracy are alleged by respondents, and, while the court does not use that term in the conclusion, yet it does find certain facts, and from them concludes

that appellants' course of dealing was such that they should now be estopped to assert a forfeiture. Considering the facts as found, and in the absence of evidence, we shall not undertake to say that the conclusion is incorrect.

"We have recently, in the case of *Insurance Company v. Norton* (*supra*, p. 234), shown that forfeitures are not favored in the law; and that courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Any agreement, declaration, or course of action, on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract." *Insurance Co. v. Eggleston*, 96 U. S. 572, 577.

It is assigned that the court further erred in its conclusion that respondents were not in default when this action was commenced. We think this point is settled by the conclusion above discussed, wherein the court concluded that there was a waiver of the time and forfeiture provision of the contract, and that by reason thereof respondents could not be placed in default until after demand for payment and the lapse of reasonable time. No demand for such payment appears to have been made, but, upon the contrary, respondents were informed that the contract was canceled, and that no more payments would be received. After waiver of forfeiture, the right of the vendee to acquire title by payment of the residue of the price continues until after demand for such payment by the vendor and a refusal of the vendee. 1 Beach, Modern

Law of Contracts, § 140. The conclusion that they were not in default was, therefore, not erroneous.

Error is assigned upon the courts' conclusion that respondents are entitled to judgment of dismissal. It is contended that, since appellant Matilda Whiting was a separate owner of an undivided half of the property, and not a party to the contract, and since her co-appellant undertook to sell something he did not own, respondents cannot, for that reason, enforce their contract. The reasoning concludes, that, since respondents have not an enforceable contract, appellants are entitled to recover, and that it was error to dismiss their action. The court, however, found that Matilda Whiting, by bringing this action, has claimed and is claiming the benefit of said contract; that she is claiming the benefit of the forfeiture clause therein, and has thereby accepted the contract and ratified the same. We think it must be so held. She knew the money paid was upon the faith of securing the whole title, her own as well as her husband's, and when she sought by this suit to declare a forfeiture of that money, a part of which was to apply upon payment for her own title, she thereby sought to become a beneficiary of the funds, and must be held to have accepted and ratified the contract from its inception.

Both parties have asked affirmative relief in their pleadings, and both complain that the court did not give it. Respondents, however, did not appeal, and are, therefore, not in position to complain. It is our view that under the record as it is before us, if respondents kept their tender good they were entitled to the relief they asked; that is to say, to a decree requiring both appellants to convey to them and quieting their title. The record shows that respondents withdrew the amount of their tender from the

clerk's office on the 18th day of April, 1902. The findings of the court were not entered until June 12. Meantime, as we understand from a brief supplemental record filed here, the tender was returned to the clerk's office April 29, 1902. Judgment was not entered until June 24. The supplemental record also shows that the tender was withdrawn the day after judgment was entered. It thus appears that there was a tender in court at the time both the findings and judgment were entered, and we think, under respondents' affirmative answer, they were entitled to a decree as above indicated. But since they again withdrew their tender, and have not appealed, we will not reverse the judgment in their behalf. It is therefore affirmed.

DUNBAR, MOUNT and ANDERS, J.J., concur. FULLERTON, C. J., not sitting.

[No. 4496. Decided March 19, 1903.]

MORRIS AHERN, *Appellant*, v. LAWRENCE AHERN *et al.*
Respondents.

COMMUNITY PROPERTY — LANDS ACQUIRED UNDER HOMESTEAD LAWS.

The community heirs of a deceased wife are entitled to a half interest in land acquired under the homestead laws of the United States, although patent conveying the legal title thereto was not issued to the husband until after the death of his wife, where the equitable title had vested during the existence of the community.

SAME — STATUS AT INCEPTION OF TITLE GOVERNS.

Where the inchoate title to land had its inception during the existence of the community, the legal title thereto, when acquired by a surviving spouse after the dissolution of the community by death, would inure to the benefit of the community heirs.

31	334
35	660
35	662
31	334
339	75
31	334
41	189
41	194

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Appeal from Superior Court, Adams County.—Hon. FRANK H. RUDKIN, Judge. Affirmed.

W. W. Zent and *A. E. Gallagher*, for appellant.

O. R. Holcomb, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—This action was brought by appellant against respondents to quiet title to two quarter sections of land in Adams county, Washington. The court found in favor of appellant as to one quarter section, known as the railroad land, and found that the respondents were half owners of the other quarter section of land, known as the homestead of appellant. The appeal is from the finding of the court in relation to the homestead. The stipulated facts are that appellant and Bridget Ahern were husband and wife for about thirty-five years prior to December 31, 1894, on which last day Bridget Ahern died intestate, leaving the respondents, together with the appellant, as her surviving heirs at law. On the 21st day of May, 1888, appellant made a homestead entry on the lands in question under the homestead laws of the United States, and he and his wife lived thereon thereafter, and complied with the United States laws, rules, and regulations relating to homesteads, until the wife died as aforesaid. Appellant did not make application to make final proof on said homestead for several months after the death of his wife, but after her death did make final proof, and received his final receipt of said homestead entry for said land on January 27, 1896, and thereafter, on July 31, 1896, received a patent of that date from the United States, conveying said homestead land to him. As conclusions of law, the court found the respondents were the owners of an undivided one-half interest in said

homestead, and that the appellant was the owner of the other undivided one-half interest, and entered a decree adjudging that appellant was not entitled to have the title to said land, except one-half thereof, quieted in him, as against the respondents. The appeal is from such decree.

There are two questions involved in this case, which are raised by this appeal: (1) Do the laws of this state apply to such a conveyance? and (2) if they do, is such property community property? It is the contention of the appellant that the cause involves a federal question, and necessitates a construction of the homestead laws of the United States; that the state laws cannot control the title to lands which are acquired under the homestead act? and, further, that, if it be decided that they do, this particular land is not community property under the provisions of the community property laws of the state. Both these questions have been decided by this court against the contention of the appellant. In *Kromer v. Friday*, 10 Wash. 621 (39 Pac. 229, 32 L. R. A. 671), it was decided that where the equitable title was vested in the community, and the legal title was not obtained until after the death of one of the spouses, the legal title also then vested in the community. On the second proposition, it was there also decided that, within the intent of our laws relating to community property, such land was, in effect, taken by purchase, by reason of the settlement and improvements thereon, in which the wife, as well as the husband, participated, and consequently that the land was community property. To the same effect is *Brazee v. Schofield*, 2 Wash. T. 209 (3 Pac. 265), and *Roeder v. Fouts*, 5 Wash. 135 (31 Pac. 432). It is admitted by appellant that such has been the holding of this court, but he insists that such holdings were erroneous, and

asks the court to adopt the rule contended for by him—that the laws of the state have no application to lands secured under the homestead act—and, further, that such property is not community property under the provisions of the state community property law. If the question were one for present determination, we could but arrive at the same conclusion as before. In *Forker v. Henry*, 21 Wash. 235 (57 Pac. 811), we held that a homestead settled upon and improved by a woman before marriage, who continued to reside there, together with her husband, after her marriage, and to whom a patent was issued therefor after final proof was made, was the separate property of the wife. This decision was rendered upon the theory that, if either spouse before the marriage had acquired an equitable right to property which was perfected after marriage, the status of the property would follow the right of the spouse who had an equitable interest in the property before marriage. The same reasoning would compel the holding in this case that the property was the property of the wife, she being one of the community at the time the provisions of the law were complied with, which compliance secured to the community the right to obtain title to the property. In the case just cited, after laying down the rule announced above, it was said:

“But the rule also seems to prevail in favor of the community as to the title initiated during the community and perfected after the dissolution of the marriage.”

As sustaining this rule, see, also, *Caruth v. Grigsby*, 57 Tex. 259; *Hodge v. Donald*, 55 Tex. 344; *Carter v. Wise*, 39 Tex. 273; *Cannon v. Murphy*, 31 Tex. 405; *Wilkinson v. Wilkinson*, 20 Tex. 237; *Yates v. Houston*, 3 Tex. 433.

We know of no cases holding to the contrary, and, even

conceding, without deciding, that a construction of the homestead laws is necessary, it seems to be the doctrine of reason and justice that, where the community has done all that the law requires it to do, the equitable title vests; that it is the doing of the thing required, and not the proof of the doing, which meets the requirements of the law; that the proof is only evidentiary matter which establishes the fact which already existed. In addition to this the supreme court of the United States has uniformly held that the right to a patent, once vested, is treated by the government, when dealing with the public lands, as equivalent to a patent issued; that, when in fact the patent does issue, it relates back to the inception of the right of the patentee; and that before such title passes, but after the acquiring of the right to the title, the government simply holds the title in trust for the benefit of the owners of the equitable title. So that, when the provisions of the homestead law had been complied with by this community, the equitable title vested in the community, and, when the legal title passed from the government of the United States, it related back to the inception of the right of the patentee.

On the other question involved we are equally satisfied that, under the laws of the state, this land was community property. It is said in 6 Am. & Eng. Enc. Law (2d ed.) p. 317, in discussing inchoate titles, that the doctrine of relation, whereby a title takes effect as of the time of the first act initiating it, is often invoked to determine, as between the community and one of the spouses, whether the property is separate, or falls into the community; that, if either spouse before the marriage has acquired an equitable right to property which is perfected after the marriage, the property is separate, and that the same rule will pre-

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vail in favor of the community as to a title initiated during the community, and perfected after the dissolution of the marriage; that in the first case the title takes effect as of a time before the community (the property is therefore separate) and in the other as of a time during the community (it is therefore community property). It will be observed that separate property is defined by the statute, and the law provides that all other property acquired after marriage, by either husband or wife, or both, is community property. From these provisions of the law limiting the separate property by description, and proclaiming all other property not so limited and described as community property, this court has decided, in accordance with the elementary idea running through the community property system of laws, that all property acquired after marriage is presumptively community property. Certainly it is by the combined efforts of the husband and wife that title to homestead lands is acquired. The homestead law contemplates this, for, in the case of a man with a wife, it becomes necessary, in order to prove a residence, to show that the wife or family resided upon the homestead for the period during which residence was acquired.

We think there was no error committed by the court in holding the land in question to be community property, and the judgment is therefore affirmed.

FULLERTON, C. J., and MOUNT, ANDERS and HADLEY, JJ., concur.

[No. 4592. Decided March 19, 1903.]

In the Matter of the Estate of Rosetta L. Sutton, Deceased,
G. D. SUTTON, Appellant, v. J. W. OSBORNE, Respondent.

APPEALABLE ORDER — REFUSAL TO VACATE ORDER APPOINTING ADMINISTRATOR.

The denial of a motion to vacate an order appointing an administrator is an appealable order, under Bal. Code, § 6500, subd. 6, which allows appeal from any order affecting a substantial right in a civil action which either in effect determines the action and prevents a final judgment therein, or discontinues the action.

ADMINISTRATION OF DECEDENT'S ESTATE — PREFERENCE RIGHT OF HUSBAND — WAIVER.

Where a surviving husband neglected for three years to apply for letters of administration upon the estate of his deceased wife, his preference right to appointment would not entitle him to the vacation of an order appointing another as administrator, when there is nothing showing the incompetency or unsuitability of the latter, since it is provided by § 6141, Bal. Code, that if one entitled to administer shall neglect for more than forty days after the death of the intestate to apply for letters of administration, then the court may appoint any suitable and competent person to administer such estate.

Appeal from Superior Court, Spokane County.—Hon. GEORGE W. BELT, Judge. Affirmed.

James Hopkins, for appellant.

R. E. Porterfield, for respondent.

The opinion of the court was delivered by

HADLEY, J.—Rosetta L. Sutton died on the 21st day of September, 1899. Her husband, G. D. Sutton, and four children, none of whom were minors, survived her. The

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deceased died in Spokane county, where she resided at the time of her death. She left an estate in that county of the probable value of \$10,000. She died intestate, and no administrator of her estate was appointed until October 6, 1902. On the last named date the respondent, J. W. Osborne, upon his own petition and that of the children of the deceased, was appointed administrator. It appears from the record that notice of hearing upon the petition was regularly given for September 29, 1902, and that on said date, when the matter was called for hearing, upon the request of appellant, who was present in court, the hearing was postponed until October 6, 1902. Upon the last-named date the matter came on for hearing, and respondent was appointed as aforesaid. Appellant appears not to have been present at the time of the hearing, but afterwards, and upon the same day, he and his attorney appeared before the judge, and were advised as to what had been done. Thereafter appellant filed a motion to vacate the aforesaid order of appointment, and also moved that he be appointed administrator. The motion was accompanied with affidavits containing alleged reasons for the absence of appellant at the time of the hearing when the order of appointment was made, and was also accompanied with a formal petition showing that appellant is the surviving husband of the deceased, and asking his appointment for that reason. The motion was denied. Appellant thereafter gave notice of appeal, and has appealed from the order denying the motion to vacate the order of appointment.

Respondent urges that the order denying the motion to vacate is not an appealable one, on the alleged ground that it is an interlocutory order, and does not fall within any of the classes of appealable orders. We think the order

is appealable under § 6500, Bal. Code, which provides that any party aggrieved may appeal to this court in the cases therein named. Subdivision 6 of said section provides as follows: "From any order affecting a substantial right in a civil action or proceeding which either (1) in effect determines the action or proceeding and prevents a final judgment therein; or (2) discontinues the action. . . ." The effect of the order appealed from is to determine and discontinue the proceeding as far as any rights of appellant in the premises may be concerned, and he is therefore entitled to an appeal. The statute was so construed in *State ex rel. Stratton v. Tallman*, 29 Wash. 317 (69 Pac. 1101).

Appellant bases his claim of right to have the order of appointment vacated on the ground that he is the surviving husband, and as such, has the right of administration over all others, under the provisions of § 6141, Bal. Code. It will be observed by reference to said section that, if one entitled to administer shall neglect for more than forty days after the death of the intestate to present a petition for letters of administration, then the court may appoint any suitable and competent person to administer such estate. There is no statement of facts here showing the testimony heard by the court at the time respondent was appointed. It must therefore be presumed that the testimony was sufficient to show respondent to be a suitable and competent person to administer, and the order of appointment is tantamount to a finding to that effect. The statute gives the court the undoubted power to appoint any suitable and competent person if those specially entitled to administer shall not present a petition within forty days after the decedent's death. For nearly three years after the death of his wife, appellant neglected to petition

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Syllabus.

for his appointment. He first appears in court to resist the appointment of another, whose petition has come on regularly to be heard, and as ground for such resistance asserts a preference right to be appointed himself. Under the statute, he had lost that preference right by his own neglect. His neglect did not necessarily render him incompetent to administer, and under some circumstances, perhaps, the court might have regarded him the most suitable person. The attention of the court was, however, first called to this estate, not by appellant, but by the joint petition of respondent and the children of the deceased. It will be presumed by this court under the record that good reasons appeared to the court below for making the appointment which it did, and for refusing to vacate the order of appointment. The appointment of respondent was asked by the children of the deceased, who are interested in the estate. The power to make such an appointment being clearly given by statute, the order should not be disturbed unless it were made satisfactorily to appear that respondent is not a suitable and competent person. As stated, there is no evidence to that effect in the record, and it is not even asserted that such is the fact.

The judgment is affirmed.

FULLERTON, C. J., and MOUNT, DUNBAR and ANDERS, JJ., concur.

[No. 4326. Decided March 20, 1903.]

HENRY WAGNITZ, *Appellant*, v. GEORGE FREDERICK RITTER, *Respondent*.

APPEAL — APPEALABLE ORDER — QUASHING SUMMONS.

An order quashing a summons in effect discontinues the

31	843
35	280
31	843
40	578

action, when made after the expiration of the statutory limit on service of summons, and is therefore an appealable order.

SAME — CESSATION OF CONTROVERSY.

The fact that the trial court dismissed an action subsequent to the taking of an appeal from its order quashing a service of summons, would not work such a cessation of the controversy as would require a dismissal of the appeal.

PROCESS — SERVICE BY NON-RESIDENT ATTORNEYS.

Non-resident attorneys who have been admitted to the bar of this state are authorized to issue summons in actions in this state, and may perform this act outside the state as well as within its borders, provided the summons specifies a place within the state where an answer thereto may be served, within the meaning of Bal. Code, § 4870, which provides that the defendant shall "answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the state therein specified in which there is a postoffice."

SAME — FORM OF SUMMONS — STATUTORY REQUIREMENTS.

A summons issued in conformity with the form set forth in the statute, and which substantially follows the sections enumerating the necessary contents of the summons, is good as against a general objection that it is void on its face, raised for the first time on appeal, even if the summons may not have fully incorporated everything required by other sections of the statute.

Appeal from Superior Court, Whatcom County.—Hon. JEREMIAH NETERER, Judge. Reversed.

C. A. Moore, J. Van Zante, Frank Schlegel and B. E. Padgett, for appellant.

Fairchild & Bruce, for respondent.

The opinion of the court was delivered by

FULLERTON, C. J.—This is an appeal from an order quashing the services of a summons. On October 5th, 1901, the appellant caused an action to be commenced in the superior court of Whatcom county, in which he sought to recover a money judgment. At the time of filing the complaint therein, the appellant caused an attachment to

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issue, under which certain real property belonging to respondent, and situated in Whatcom county, was levied upon and attached. The complaint was subscribed by three attorneys, each of whom was a non-resident of the state, and only one of whom was a member of the bar of this state and entitled to practice herein. Summons, subscribed by the attorneys subscribing the complaint, was placed in the hands of the sheriff for service, who made return thereon to the effect that the respondent could not be found in Whatcom county. The appellant thereupon filed an affidavit showing that the respondent resided out of the state, that his post-office address and place of residence was at Portland, in the state of Oregon, and asked for and obtained an order granting them permission to personally serve the respondent at that place. On the granting of the order a new summons was issued, which was personally served on the respondent at Portland, Oregon, on October 19, 1901. This summons was also subscribed by the attorneys subscribing the complaint, and was regular in every respect, save that it did not in the body thereof require the respondent to serve a copy of his answer on the person whose name was subscribed to the summons at a place named therein, as seemingly contemplated by § 4870 of the Code (Ballinger's), but followed the form given in § 4872, designating their post-office address as "Care Clerk Superior Court, New Whatcom, Wash." On December 16, 1901, the respondent appeared specially by his counsel, and moved to quash and set aside the summons, "upon the ground and for the reason that the alleged summons herein was unauthorized and improperly issued in that the said C. A. Moore, J. Van Zante, and Frank Schlegel, the so-called attorneys for the plaintiff, are not officers of this court and

are not authorized and have no authority to issue process from this court." This objection was on February 3, 1902, after hearing, sustained and the service quashed, on the grounds, as recited in the order, that the attorneys "whose names are subscribed to the so-called summons herein as attorneys for the plaintiff were at the time of the issuance of the said summons; and at all times herein, residents of the state of Oregon, and domiciled at Portland said state; and that said so-called summons was signed and attempted to be issued in the city of Portland, Oregon." On March 5, 1902, and after the appellant had appealed from this order, the court of its own motion dismissed the action, from which the appellant also gave a notice of appeal, but did not file the statutory bond required to perfect it.

The respondent moves to dismiss the appeal, assigning as reasons that the order quashing the summons is not an appealable order, and that there is no controversy pending between the parties. These contentions are without merit. It was held in *Embree v. McLennan*, 18 Wash. 651 (52 Pac. 241), and *Deming Investment Co. v. Ely*, 21 Wash. 102 (57 Pac. 353), that an appeal will lie from an order quashing the service of summons, which in effect determines the action and prevents a final judgment therein. Such was the effect of the order before us. In this state an action is commenced by the service of a summons, or by filing a complaint and serving a summons within ninety days thereafter. As more than ninety days had elapsed between the time the complaint was filed in the present action and the order quashing the service was entered, there could be no new service of the summons. *Deming Investment Co. v. Ely*, *supra*. The order, therefore, had the effect of discontinuing the action, and is

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appealable under the statute. The second ground of the motion is based upon the fact that the trial court, subsequent to the appeal, dismissed the action. It is said that this latter judgment disposed of the case finally; that it is an independent judgment, and, if this court should reverse the first order, it would not have the effect of reinstating the case on the docket of the court, as it would not operate as a reversal of the order of dismissal. But, as we have shown, the order quashing the service of the summons had the effect of discontinuing the action. It was of itself, so far as that court was concerned, a final order, which fixed and determined the rights of the parties in that court. The subsequent order of dismissal, therefore, could add nothing to its effect or finality, and, even if it were to be conceded that a trial court could in any case destroy the effect of an appeal granted by statute and lawfully pursued by voluntarily entering orders therein, this is not such a case.

Passing to the merits of the controversy, it will be seen from the recitals in the order of the trial court that the motion to quash was sustained on the ground that the attorneys who signed the summons had no authority under the statute to issue a summons, because they resided without the state of Washington, and sought to issue the summons from their place of residence. These contentions, and the further contention that the summons is void on its face, are relied on in this court to sustain the order. It is conceded that there is no express provision of the statute to the effect that an attorney residing in another state, authorized to practice law in this state, may not issue a summons over his own name, and also that there is no express provision to the effect that he cannot issue the summons from a place without the state. It is said,

however, that there are implied provisions to that effect, and that they are found in the sections of the statutes relating to the manner of commencing actions, and to the form and contents of a summons. Turning to these sections, it will be noticed that it is necessary, in order to commence an action, if the defendant does not voluntarily appear, to serve a summons. It will be noticed, also, that these sections are not entirely consistent. By § 4870, Bal. Code, it is provided that the summons must require the defendant to "answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the state therein specified in which there is a post-office"; while § 4871, which also purports to prescribe what the summons shall contain, omits this requirement, substituting therefor the requirement that the defendant shall appear "and defend the action." The first mentioned, again, seems not to require that the post-office address follow the subscription of the plaintiff's or attorney's name to the summons, while the second makes this necessary. The form given in § 4872 complies literally with the second section quoted, but with the first only substantially, if at all. The argument against the right of a nonresident attorney to issue a summons is based upon the first section cited. It is said that, inasmuch as the summons must contain a direction to the defendant to serve his answer on the person whose name is subscribed to the summons, "at a place within the state therein specified at which there is a post office," it was intended that the person subscribing the summons should have a place of residence within the state, and that none other can issue a summons. But we cannot think this a proper construction of the statutes, taken as a whole. The section of the statute which permits an attorney residing in and who is

a citizen of another state to become a member of the bar of this state puts no restrictions upon his powers or privileges which it does not put upon resident attorneys. It was enacted subsequent in time to the section of the statute which is claimed to require a residence. It would seem naturally to follow, therefore, that, if the statute was originally enacted for resident attorneys only, that a subsequent statute empowering the courts to admit to practice attorneys residing in another state and giving them all the powers of local attorneys, would operate of itself as a repeal or modification of the first statute in so far as the two were conflicting. But it is unnecessary to go to this extent. A nonresident attorney may name a place within the state at which the summons can be served on him or some one for him, and thus comply with even the literal requirements of the statute. Nor is there any merit in the objection that the summons was issued by the attorney outside of the state. The summons is in no sense a process of the court; it is a notice merely, which an attorney is authorized to issue and cause to be served without the direction or knowledge of the court. Its proper service and filing in court, with due proof of service, is the essential thing which gives the court jurisdiction over the person or property of an unwilling defendant. It can make no difference, therefore, at what place the summons is made out or subscribed.

The next question is, was the summons void on its face? As we say, it followed the form prescribed in § 4872, rather than the requirements of § 4870. It did not, therefore, contain in its body a direction to the defendant requiring him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons at a place within the state therein specified in

which there is a post-office, but contained a direction to the defendant to appear within sixty days after service of the summons and defend the action, to which was subscribed the names of the attorneys, followed by their post-office address at a place within the state. This was a sufficient compliance with the statute. Ordinarily, where a statute, consisting of several sections, provides for the issuance of a notice or writ, prescribes certain requirements for it, and subsequently gives a form to which it may substantially conform, it is sufficient to give the notice or issue the writ in the form prescribed, whether or not it contains all of the prescribed requirements; the reason being that it will be presumed that the legislature treated the language of the form and the language of the sections prescribing the requirements as synonymous. But were the rule otherwise, we cannot think the present summons void on its face. It is subscribed by an attorney authorized to issue a summons, who gives, following his name, his post-office address at a place within the state. Whether this would be sufficient if seasonably attacked on this ground in the lower court, we shall not decide, as it is clearly good against the general objection that it is void on its face, raised here for the first time.

The order appealed from is reversed, and the cause remanded to the lower court to reinstate the case and require the respondent to answer to the merits.

MOUNT, DUNBAR and ANDERS, JJ., concur.

[No. 4582½. Decided March 20, 1908.]

SUSAN A. RAMSAY, *Respondent*, v. TACOMA LAND COMPANY *et al.*, *Appellants*.

APPEAL — DISMISSAL — SUFFICIENCY OF NOTICE AND BOND.

Where the attorney for defendants gave notice of appeal for all of them and executed a bond in behalf of all, no ground is afforded for dismissal of the appeal by reason of the facts that certain of the appellants failed to execute the appeal bond, and that notice of appeal was not served on some of them.

PUBLIC LANDS — RAILROAD GRANTS — SALE OF LANDS EXCLUDED FROM GRANT — PREFERENCE RIGHTS OF PURCHASER.

Under 24 St. at Large, 557, § 5, which provides that where any railway company shall have sold to citizens of the United States as a part of its land grant from the government lands coterminous with the constructed portion of its road, but which are for any reason excepted from the operation of its grant, the *bona fide* purchaser may make payment to the United States at the government price and shall thereupon be entitled to patent, one who had in good faith purchased the land from the railroad company, and, upon the decision of the land department adverse to the railroad's right to the land, had applied within a reasonable time to make purchase under the above act of congress, had a preference right as against a homestead entryman, who had made entry within four months after notice of cancellation of the railroad's right to the land, and with actual knowledge of all the facts.

SAME — CITIZENSHIP OF CORPORATIONS.

A corporation organized under the laws of any state is a citizen of the United States within the meaning of 24 St. at Large, 557, authorizing citizens of the United States, in certain cases, to purchase government lands.

Appeal from Superior Court, Pierce County.—Hon. THAD HUSTON, Judge. Reversed.

E. R. York, for appellants.

J. W. A. Nichols and *John C. Stallcup*, for respondent.

The opinion of the court was delivered by

MOUNT, J.—The respondent brought this action in the court below, and prayed that she be decreed to be the owner of the southwest quarter of the northwest quarter of section 3, township 20 north, of range 2 E., W. M., situate in Pierce county, Washington, and that defendants be decreed trustees of the title for the use of respondent. A decree was entered as prayed, and defendants appeal.

A motion is made to dismiss the appeal because certain of the appellants failed to execute the bond on appeal, and because the notice of appeal was not served on certain of the defendants. We find that the notice of appeal was given by all the defendants by their attorney, and the bond was executed on behalf of all, also by their attorney. The motion is therefore denied.

The facts in the case are not disputed, and are substantially as follows: The land in question is located within the primary limits of the land grant made to the Northern Pacific Railroad Company by joint resolution of congress of May 31, 1870. The railroad company, on August 13, 1870, filed its map of general route, and on May 14, 1874, filed its map of definite location in the office of the secretary of the interior. Pursuant thereto, the land department of the United States withdrew and reserved from sale and entry the odd-numbered sections of land within the limits of the grant, including the land in question. Prior to the grant, and on May 19, 1869, one W. C. Kincade had made a pre-emption filing on the land, but had abandoned the filing and the land prior to the act of 1870. Subsequent to the filing of the map of definite location, the land was held by the railroad company, and considered by the land department to have passed to the railroad company by the grant, until the departmental decision of July 13,

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1896, in *Corliss v. Northern Pacific R. R. Co.*, which held that lands of this character were excepted from the grant. In 1874 the Northern Pacific Railroad Company, for value and in good faith, sold and conveyed the land to the Tacoma Land Company, a corporation, and *bona fide* purchaser for value. Thereafter the Tacoma Land Company, for value and in good faith, sold the land to the other appellants herein, who also purchased in good faith and for value. On October 13, 1896, the commissioner of the general land office of the United States, by letter of that date, on the basis of the decision in *Corliss v. Northern Pacific R. R. Co.*, canceled the railroad company's list of the land in question. On February 24, 1897, the respondent filed in the local land office her application to enter the land as a homestead. The filing was accepted, and, in May, 1897, she went upon the land where she has since remained, and made improvements thereon to the value of \$1,200. In August, 1897, the Tacoma Land Company filed its application in the local land office to purchase the land under § 5 of the act of congress of March 3, 1887. The respondent contested the right of the Tacoma Land Company to purchase, and the local office, upon a hearing, decided in favor of the land company and awarded the land to the said company. An appeal was taken from this decision to the commissioner of the General Land Office, and thereafter to the Secretary of the Interior, and each of these departments affirmed the decision of the local land office. On October 4, 1900, the homestead entry of respondent was canceled, and on February 20, 1901, a patent for the land was issued by the United States to the Tacoma Land Company. No fraud or imposition is alleged or claimed in this case. The only question in the case is whether or not the land

department of the United States has properly construed § 5 of the act of congress approved March 3, 1887 (24 St. at Large, p. 557), as giving to the Tacoma Land Company a preference right to purchase the land in question over the respondent, who, with knowledge of the rights of appellants, had filed on the land prior to the application of the land company to purchase. Section 5 of the act is as follows:

“That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns.”

In *Wiseman v. Eastman*, 21 Wash. 163 (57 Pac. 398), this court held that, where the charge is mistake or misconstruction of law by the Land Department, the courts will not set aside a patent or declare a trust in lands, unless such mistake or misconstruction is clearly manifest. In *United States v. Winona Railway Co.*, 165 U. S. 463 (17 Sup. Ct. 368), the supreme court of the United States, in construing the section in question said:

“Section 5 of the same act applies to cases in which no certification or patent has issued, and yet the lands sold by the railroad company are the numbered sections prescribed in its grant, and coterminous with the constructed portions of its road, and it is there provided that where

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the lands so sold by the company 'are for any reason excepted from the operation of the grant to said company,' the purchaser may obtain title directly from the government by paying to it the ordinary government price of such lands. It is true the term used here is '*bona fide* purchaser,' but it is a *bona fide* purchaser from the company, and the description given of the lands, as not conveyed and 'for any reason excepted from the operation of the grant,' indicates that the fact of notice of defect of title was not to be considered fatal to the right. Congress attempted to protect an honest transaction between a purchaser and a railroad company, even in the absence of a certification or patent. These being the provisions of the act of 1887, the act of 1896, confirming the right and title of a *bona fide* purchaser, and providing that the patent to his lands should not be vacated or annulled, must be held to include one who, if not in the fullest sense a '*bona fide* purchaser,' has, nevertheless, purchased in good faith from the railroad company. . . . Our conclusion is that these acts operate to confirm the title to every purchaser from a railroad company of lands certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the land department, and notwithstanding the fact that the lands so certified or patented were, by the true construction of the land grants, although within the limits of the grants, excepted from their operation, providing that he purchased in good faith, paid value for the lands, and providing, also, that the lands were public lands in the statutory sense of the term, and free from individual or other claims."

It seems that the facts in this case bring the appellant strictly within the letter and spirit of that statute as above construed. This land had been sold by the Northern Pacific Railroad Company as part of its grant. The Tacoma Land Company, for value and in good faith, became the purchaser. The land was in an odd numbered section, and coterminous with the constructed part of the com-

pany's road. The land was excepted from the grant by reason of the fact that Kincade had filed a pre-emption thereon prior to the grant. But, prior to the passage of the resolution of 1870, Kincade had abandoned his filing and the possession of the land, and never returned to claim the same. Prior to 1896 the land had been treated by the railroad company and the land department as belonging to the railroad company, and, while so treated, was purchased by the Tacoma Land Company and the other appellants, and, while the deeds of the purchasers were on file in the county where the lands are situated, and within four months after the land department had notified the local land office that the enlistment of the land by the railroad company had been canceled, the respondent filed on the land. Under these circumstances, the local land office had no right to accept the filing of respondent, and thereby terminate the right of appellants to purchase under § 5 of the act of 1887, above quoted. We are satisfied that the appellants had a preference right to purchase within a reasonable time, and that the land department correctly construed the law in so holding.

It is argued by respondent that the Tacoma Land Company, which is a corporation under the laws of the state of Pennsylvania, is not a citizen of the United States within the meaning of the statute, and is for that reason not entitled to purchase under § 5 of the act of 1887. This question, we think, was settled against respondent's contention in *United States v. Northwestern Express, Stage & Transportation Co.*, 164 U. S. 686 (17 Sup. Ct. 206).

For these reasons, the judgment of the lower court is reversed, and the cause dismissed.

FULLERTON, C. J., and HADLEY, DUNBAR and ANDERS, JJ., concur.

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Syllabus.

[No. 4491. Decided March 21, 1903.]

LEWIS COUNTY, *Respondent*, v. JAS. K. SCHOBEEY *et al.*,
Appellants.

EMINENT DOMAIN — APPROPRIATION OF LAND FOR DRAINAGE PURPOSES
— SUFFICIENCY OF PETITION.

A petition for condemnation of lands for ditch purposes, under Laws 1895, p. 142, is not demurrable for want of an averment that an offer to purchase was made prior to the beginning of suit, since the statute is in the alternative, and authorizes the county commissioners to either purchase or condemn.

SAME.

The petition in a proceeding instituted by county commissioners for the condemnation of land necessary for the construction of a ditch need not set forth in exhaustive detail all the steps taken by the commissioners, but is sufficient if it notifies defendants in plain and specific language of the issues to be tried.

SAME — DAMAGES — TO WHOM ASSESSABLE.

A judgment awarding damages for the appropriation of land for ditch purposes against the ditch district, which might be an irresponsible party, instead of against the county in whose name the action was instituted, would work no injury to the person whose property was damaged, where the judgment provided that the proceedings should stand abated unless the damages were paid within a specified time.

SAME — COSTS.

Where proceedings for the appropriation of land for ditch purposes are instituted in the name of a county, but in reality for the benefit of a ditch district, which is the real party in interest, the district and not the county would be liable for the costs.

Appeal from Superior Court, Lewis County.—Hon. H. W. B. HEWEN, Judge *pro tem*. Affirmed.

W. W. Langhorne, for appellants.

David Stewart, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—This is a condemnation proceeding, instituted by the commissioners of Lewis county against the land of appellants under the provisions of the act of March 19, 1895 (Laws 1895, p. 142). Judgment of condemnation was awarded against a strip of appellant's land, and judgment of damages in favor of appellants for \$60 and costs against the Lincoln Creek ditch fund.

Motion is interposed by the respondent to dismiss the appeal, but, inasmuch as it appears by stipulation found in the record that several other like cases are pending, which are to be determined by the decision of this court on the case under consideration, and since the conclusion reached on the merits renders a decision of the motion to dismiss unnecessary, we have thought it best to pass the motion without discussion or decision, and decide the case on its merits. For this reason we will briefly discuss the error alleged in overruling the demurrer to the petition, although it is doubtful if that question could properly be presented on this appeal by virtue of the notice of appeal, which notifies the respondent that the appeal is taken only from so much of the judgment as adjudges that the damages and costs shall be taxed against the Lincoln Creek district. But, considering the point properly raised, we think the petition was sufficient, and that no error was committed in overruling the demurrer to the same. The petition is the ordinary petition in such cases, and we do not think that it is within the contemplation of the statute that the petition should set forth in exhaustive detail all the steps taken by the commissioners. The proceeding is not intended to be a technical or difficult one. The defendants are notified in plain and specific language of the issues to be tried, and this is sufficient to meet not only the re-

quirements of the act, but the spirit of the general provisions of the Code in relation to pleadings. Neither is it necessary that there should be an averment that an offer to purchase was made prior to the beginning of the suit. The statute is in the alternative, and authorized the commissioners to either purchase or condemn.

The alleged error upon which the notice of appeal is given is the action of the court in adjudging that the damages and costs shall be taxed against the Lincoln Creek district. This assignment of error is not exactly in accordance with the judgment, which taxes the costs and damages to the Lincoln Creek district fund. It is earnestly contended by the appellants that the Lincoln Creek district or the Lincoln Creek district fund may or may not be responsible, but, so far as the damages for the taking of appellants' property are concerned, appellants cannot be injured in any way, nor are any of their constitutional rights invaded or imperiled by this judgment. It is specifically provided in the judgment that, unless the damages awarded are paid within a specified time, the proceedings shall stand abated, and that, until the compensation is fully paid and satisfied, no entry or occupancy of said lands, or any part thereof, shall be taken or had on the part of the plaintiff. It is true that, so far as the costs are concerned, a hardship might be imposed upon the defendants if the ditch district should happen from any reason to disband without any available fund out of which the costs could be collected, but this is liable to occur to any litigant with an irresponsible antagonist. Inasmuch as the county seems by the law to be made simply the agent of the district for the purpose of determining the value of the land sought to be condemned for the benefit of the district, and is not the real party in interest, the controversy actu-

ally being waged between the district and the defendants, the county is not responsible for the costs, and no error was committed by the court in refusing to so adjudge.

Affirmed.

FULLERTON, C. J., and HADLEY, MOUNT and ANDERS, JJ., concur.

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[No. 4232. Decided March 28, 1908.]

OTTO NOERDLINGER, *Appellant*, v. B. F. HUFF, *as Sheriff of Chehalis County, Respondent*.

JUDGMENT — COLLATERAL ATTACK — PRESUMPTIONS — JURISDICTION OF PERSONS.

As against collateral attack, it will be presumed, in support of a judgment obtained upon service made by a special constable, that the officer was properly appointed and had authority to act.

SAME — JUDGMENT OF JUSTICE — ATTACK IN SUPERIOR COURT.

Under Bal. Code, § 5136, when the judgment of a justice of the peace is certified to the office of the clerk of the superior court, it becomes, in effect, a judgment of the superior court, and subject to direct attack therein.

SAME — RESTRAINING EXECUTION SALE — EVIDENCE.

In an action brought in one court to restrain an execution sale based upon the judgment of another court, evidence *dehors* the record is inadmissible for the purpose of impeaching the authority for the issuance of the execution.

SAME — JURISDICTION OF SUBJECT MATTER.

The superior court has jurisdiction of an action whose subject matter is the restraining of an alleged illegal execution sale of property which lies within the territorial jurisdiction of the court.

APPEAL — PRESUMPTIONS IN AID OF JUDGMENT.

Judgment of dismissal of an action at the time of the dissolution of a temporary restraining order therein was not error when the motion to dissolve contained recitals which were equiv-

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alent to a demurrer for want of facts, and the order dissolving the injunction was tantamount in effect to an order sustaining a general demurrer to the complaint.

SAME.

It will be presumed on appeal, in aid of a judgment rendered on sustaining a demurrer to a complaint, that the plaintiff stood on his complaint, where his exception to the order of the court was not followed by request for leave to amend.

Appeal from Superior Court, Chehalis County.—Hon. MASON IRWIN, Judge. Affirmed.

Bush & Fox, for appellant.

J. L. Corrigan, for respondent.

The opinion of the court was delivered by

HADLEY, J.—Appellant brought this action in the superior court of Chehalis county to enjoin respondent, as sheriff of said county, from selling the personal property of appellant under execution. The complaint shows that the judgment was obtained before a justice of the peace in Skagit county, that it was certified by said justice to the superior court of Skagit county, and that the execution under which respondent assumes to act was issued out of said superior court. It is alleged that, prior to the commencement of the action in the justice court, appellant was a resident of Chehalis county, and that no service of process from the justice court was ever had upon him; that he has a meritorious defense to the action, and would have appeared and defended the same if he had been served with any process or notice that a suit was pending. A temporary restraining order was issued, and respondent thereafter moved to dissolve it. Certain affidavits, record evidence, and stipulations were submitted at the hearing. The court dissolved the restraining order on the ground that it had no jurisdiction of the subject-matter, and

entered judgment dismissing the action. This appeal is from said order and judgment.

Respondent has filed no brief in this court, and we are therefore not advised as to the views of the trial court in support of its judgment. But a certified copy of the judgment of the justice of the peace was introduced at the hearing upon the motion to dissolve the injunction. It recites that the service of summons was had by leaving a copy thereof at appellant's place of abode, in Skagit county, with Mr. Grierson, a person over twelve years of age, and such was the return made by the officer. The facts recited made a good service, under § 6545, Bal. Code. The judgment also shows that the justice had jurisdiction of the subject-matter, since it discloses that the action was for the recovery of money on account for goods sold in a sum less than \$100. It is therefore regular upon its face, since it shows jurisdiction of both the subject-matter and the person. Appellant insists that, since the record shows that the summons was served by a special constable, it should also show the existence of the statutory conditions authorizing the appointment of a special constable. We think it must be presumed in support of the judgment, as against collateral attack, that the officer was properly appointed and had authority to act. The judgment being regular upon its face, is not subject to collateral attack upon the ground that it is void. If a judgment bears upon its face the evidence which renders it void, the rule is otherwise, and it is entitled to no consideration in any court as evidence of right. But this court has held that where the court rendering a judgment has jurisdiction of the subject-matter, and adjudges that jurisdiction has been properly acquired over the person of the defendant, where there is nothing in the record to contradict it, such adjudi-

cation is as conclusive as that upon any other question in ~~the case, when collaterally attacked~~. *Kizer v. Caulfield*, 17 Wash. 417 (49 Pac. 1064); *Rogers v. Miller*, 13 Wash. 82 (42 Pac. 525, 52 Am. St. Rep. 20); *Munch v. McLaren*, 9 Wash. 676 (38 Pac. 205); *Peyton v. Peyton*, 28 Wash. 278 (68 Pac. 757). It is manifest, therefore, that the record from the justice court in Skagit county, supplemented by the execution issuing from the superior court of said county, showed authority for respondent to make the sale sought to be enjoined in this action. Certain stipulated facts were submitted at the hearing, which, if used as evidence in a direct attack upon the judgment, would bear upon the question of its validity. But they could not be considered in this collateral action, under the rule of this court above stated. Under § 5136, Bal. Code, when the judgment of the justice was certified to the office of the clerk of the superior court of Skagit county it became "to all intents and purposes a judgment of said superior court," and as such was subject to attack in that court, where evidence not in the record could be introduced to show that the judgment was void. A direct attack in that court would doubtless have led to a recall of the execution until the matter could be determined, and no rights of appellant would have been jeopardized. But in this action appellant seeks in a court foreign to the judgment to restrain an execution sale of personal property, and, to justify his demand, he asks the court to hear evidence not found in the record of the judgment, for the purpose of impeaching the authority for an execution issued by another tribunal. This, as we have seen, cannot be done, under the rule heretofore followed by this court.

The superior court, in its order dissolving the temporary restraining order, states as a reason that it has no juris-

diction of the subject-matter. We think the reason stated is erroneous. The subject-matter of the action is the restraint of an alleged illegal execution sale of property within the territorial jurisdiction of the court. The subject-matter is therefore within the jurisdiction of the court and, if the judgment back of the execution disclosed upon its face that it was void, the execution would be unauthorized, and it would be the duty of the court to restrain the sale. It does appear, however, that the evidence submitted at the hearing upon the motion to dissolve was not sufficient to warrant the continuance of the restraining order, and it was therefore properly dissolved.

Judgment of dismissal was also entered at the time the temporary restraining order was dissolved. It is urged by appellant that it was error to enter final judgment until after final hearing of the cause. As a general proposition, the contention is correct, but the so-called motion to dissolve contained recitals which are the equivalent of a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action against the respondent. The order dissolving the injunction was tantamount in its effect to an order sustaining a general demurrer to the complaint. Appellant noted a general exception to the court's order and judgment, but we find no request in the record for leave to amend the complaint. Moreover, appellant does not suggest in his brief in this court that he desired to amend, or that he could have amended so as to state any cause of action different from that contained in his complaint. We will therefore presume, in support of the judgment, that appellant stood upon his complaint and did not desire to amend.

Since we think the complaint does not state a cause of action the judgment is affirmed.

FULLERTON, C. J., and ANDERS, MOUNT and DUNBAR, JJ., concur.

[No. 4495. Decided March 24, 1903.]

THOMAS WINSOR, *Appellant*, v. GERMAN SAVINGS AND
LOAN SOCIETY *et al.*, *Respondents*.

INJUNCTION — VIOLATION OF PARTY WALL AGREEMENT — ACTION BY
TENANT — NECESSARY PARTIES.

The fact that adjoining owners had under a party wall agreement provided for the common use of an elevator, stairway, and halls in the building would not make the owner of one of the buildings a necessary party plaintiff in an action by his tenant to restrain the proprietors of the adjoining building from disturbing his peaceable and quiet possession by blocking up one of the halls so as to prevent egress and ingress from said tenant's premises by way of such elevator and stairway.

SAME — ADJOINING LOT OWNERS — RESTRAINING TRESPASS — CON-
STRUCTION OF STATUTE.

Under Bal. Code, § 5433, which provides that "an injunction may be granted to restrain the malicious erection, by any owner or lessee of land, of any structure intended to spite, injure, or annoy an adjoining proprietor," a right of action is given to the one occupying the premises either as tenant or owner.

SAME — AGREEMENT FOR ARBITRATION — ESTOPPEL.

Where the *status quo* under a party wall agreement, which provided for the common use of halls, stairway and elevator in adjoining buildings, and that in case of a dispute between the parties resort should be had to arbitration, was disturbed by the wrongful action of one of the parties in dispossessing the other from the free use of the premises in dispute, the injured party may resort to the courts, instead of being compelled to propose an arbitration.

Appeal from Superior Court, King County.—Hon.
BOYD J. TALLMAN, Judge. Reversed.

Charles A. Kinnear and *James M. Epler*, for appellant.

Fred H. Peterson, for respondent.

The opinion of the court was delivered by

MOUNT, J.—This action was brought by the appellant to enjoin the respondents from closing up an entrance to a hallway, elevator, and stairway, affording access to a hotel occupied by appellant in the city of Seattle. A demurrer to the complaint was sustained by the court below, and, plaintiff electing to stand on the allegations of his complaint, the cause was dismissed. Plaintiff appeals.

The complaint alleges, in substance, that the plaintiff is a lessee from the owner and in possession of lot 3 of block 10, Maynard's Addition to Seattle, on which lot is located a building known as the "Richelieu Hotel," and used as such by the plaintiff; that the defendants are in possession of lot 4, being an adjoining lot in the same block, on which lot is located a hotel known as the "Palmer House"; that these two buildings have a common entrance, the same being a hallway fourteen feet wide, located on the ground floor on the line dividing said lots 3 and 4, and running back to an elevator on lot 3, and to a stairway on lot 4, at the end of the common hall; that the elevator and stairway lead to a hall above, which is also a common hall, affording ingress and egress to both buildings; that in this hall there is constructed an archway through which occupants must pass going to and from the buildings by the elevator and stairway; that the defendants have placed at said arch in said hall, on the property in possession of plaintiff, fire-proof shutters, and have fastened and locked the same, solely for the purpose of preventing the plaintiff and his guests from making ingress and egress to and from plaintiff's hotel; that the placing of the shutters in said hall was a trespass; that plaintiff has often removed the same, but defendants have replaced and locked the same, thereby annoying the plaintiff and his guests, and damaging his

business; that, when said shutters are closed and locked, the guests of plaintiff's hotel are unable to reach the elevator or stairway, and are thus put to such annoyance as to quit said hotel as guests; that plaintiff has no adequate remedy at law; and that, unless defendants are restrained from doing the acts above named, plaintiff will suffer irreparable injury. Plaintiff then prays for a temporary restraining order, etc. The plaintiff, in his complaint, also set up the party-wall agreement entered into between the original owners of the buildings at the time the same were constructed, in which agreement the common use of the halls, elevator, and stairways was provided for. This agreement contained the following clause:

"In case the parties hereto cannot agree on the value of that portion of said party wall to be used in the extension of said second party's said brick building, or in case of any other matter of disagreement between them under this agreement, all such matters shall be left to arbitration and each of said parties shall select a reputable person who is a resident landowner in said city, who together shall determine the matter of difference between the parties, so submitted for arbitration to them; and, in case said arbitrators cannot agree, they shall select a third of same qualifications, who, acting with the other two, shall determine such matter of difference so submitted, and an award made under this agreement shall be final between the parties hereto."

Subsequent to the filing of the complaint, the plaintiff, by leave of the court, filed a supplemental complaint, in which it was alleged that plaintiff had offered, subsequent to the filing of the complaint, to arbitrate the differences on account of the obstructions named, and that defendants had refused to arbitrate.

1. The points raised by the demurrer and argued in the brief are (1) that the owner of the building leased to

plaintiff is a necessary party; and (2) that the plaintiff cannot maintain this action because the agreement for the use of the halls in common provides for arbitration. Whether the plaintiff's landlord is a necessary party depends upon the nature of the action. This action, it seems to us, is one where plaintiff seeks to maintain the peaceable and quiet possession of property wrongfully disturbed by the defendants, and nothing more. The plaintiff alleges that he is a tenant in possession of the property, and that his possession has been disturbed by a wrongdoer. It is not necessary that the owner of the real property shall be made a party to an action by the tenant to maintain his right of possession against a wrongdoer. Taylor, *Landlord & Tenant* (8th ed.), §§ 178 and 200. Furthermore, the allegations of the complaint bring the plaintiff within the statute which provides, at § 5433, Bal. Code, as follows:

"An injunction may be granted to restrain the malicious erection, by any owner or lessee of land, of any structure intended to spite, injure, or annoy an adjoining proprietor. And where any owner or lessee of land has maliciously erected such a structure with such intent, a mandatory injunction will lie to compel its abatement and removal."

Under this section the proprietor may maintain the action. The word "proprietor" means the person occupying the premises either as tenant or owner.

2. This court, in *Van Horne v. Watrous*, 10 Wash. 525 (39 Pac. 136), said:

"Courts will enforce contracts to arbitrate disputes and make the decision of arbitrators final where the parties to a contract make it clearly to appear that such was their intention; but whenever they leave it doubtful whether such a method of settling a disputed question was intended

to be left to the final decision of arbitrators, the construction is in favor of the right to resort to the courts for redress in the usual manner."

And this was quoted with approval in *Zindorf Construction Co. v. Western American Co.*, 27 Wash. 31 (67 Pac. 374), where the decisions of this court upon that question are reviewed. But conceding this rule, and also conceding that it clearly appears from the contract for arbitration that the use of the hallway, elevator, and stairway by tenants is a matter which shall be left to arbitration, still the defendants cannot claim that right in this case; for, if it be true, as alleged, that they have unlawfully and wrongfully taken possession of the hallways, elevator and stairway, and forcibly deprived plaintiff of the use thereof, they at least by these acts have waived the arbitration clause in the agreement, and cannot now be heard to say that "we are in possession wrongfully, but, before you have any rights which may be enforced, you must propose an arbitration, and then, if we refuse, you may resort to the courts for redress." An agreement for arbitration necessarily implies that the property over which the dispute arises must remain *in statu quo* pending the arbitration. Where one of the parties to a contract of arbitration wilfully violates the contract, and wrongfully dispossesses the other, he cannot be heard to say that the other must propose an arbitration before his right of action accrues. Arbitration will not be enforced at the instance of a party who wilfully violates the contract, who is a wrongdoer, and who by his wrong changes the *status quo* of the parties or property in dispute. The complaint alleges, in substance, that the defendant wrongfully obstructed the hallway by placing therein fire-proof shutters *solely for the purpose of preventing the plaintiff and his guests from*

using the said hallway; that plaintiff has often removed these obstructions, but defendants have replaced the same. Under this allegation, it was not necessary for appellant to offer to arbitrate.

For these reasons, the judgment of the lower court is reversed, and the cause remanded with instructions to overrule the demurrer.

FULLETON, C. J., and HADLEY, DUNBAR and ANDERS, JJ., concur.

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31 382
31 386

[No. 4259. Decided March 25, 1908.]

B. SHEARER, *Respondent*, v. TOWN OF BUCKLEY, *Appellant*.

MUNICIPAL CORPORATIONS OF FOURTH CLASS — DEFECTIVE STREETS — LIABILITY FOR INJURIES.

A city of the fourth class is liable for injuries occasioned by a defective street, although no statute or charter expressly imposes such liability, where the exclusive control and management of its streets is granted to it, with power to raise money for their construction and repair. *Sutton v. Snohomish*, 11 Wash. 24, followed.)

SAME — INJURY TO PASSENGER IN VEHICLE — PROXIMATE CAUSE — CONTRIBUTORY NEGLIGENCE.

Where the complaint in an action for injuries alleged to have been received by reason of a defective street alleged that the defendant had knowingly permitted a hole or trench to remain open in a street without protection or notice to travelers, that it was so filled with muddy water as to conceal its real character and depth, that plaintiff, while driving a team of gentle horses, drove into said trench without fault on his part, and was thrown out of his wagon onto the tongue and whiffletrees, that the horses became frightened and dashed down the street, colliding with a tree, whereby plaintiff was thrown to the ground and received certain described injuries, it is not subject to demur-

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Syllabus.

rer, either on the ground that it shows the proximate cause of the injury as being other than the hole in the street, or on the ground that contributory negligence is shown on the face of the complaint.

SAME — NONSUIT.

The defendant is not entitled to a nonsuit in an action for personal injuries occasioned by its alleged negligence in permitting an uncovered and unprotected hole to remain in one of its streets, when it appears that the hole, although claimed by defendant as a natural depression in black, muddy soil, filled after a rain with mud and water, had been allowed to exist in the same condition for several weeks prior to the accident, located within a few feet of the main-traveled and planked thoroughfare of the town; that plaintiff, although knowing and seeing that the place was very muddy, had driven deliberately into it, claiming that he was not aware of its depth, because of its having the appearance of the level surface of standing water.

SAME — EVIDENCE — COMPLAINTS OF INJURIES.

In an action for personal injuries, complaints made by plaintiff a few days after the accident as to the nature and extent of his injuries are admissible in evidence, the weight of such testimony being for the jury to consider.

SAME — OTHER DEFECTS.

Evidence of the condition of a street, other than at the exact place of an accident, but confined to a space within a block thereof, is admissible as tending to show constructive notice on the part of defendant of the defective condition of the street at the particular point in controversy.

SAME — IMPUTED NEGLIGENCE.

Where one is riding in a conveyance at the invitation of the driver, over whom or the team the passenger has no control, and is injured because of a defect in the street, the negligence of the driver cannot be imputed to the passenger.

JUDGMENT — INCLUSION OF COSTS — RIGHT TO RETAX.

The inclusion of costs in a judgment would not constitute error, when they were stated as a separate item from the verdict, inasmuch as there was nothing to prevent a change in the amount of costs on motion to retax.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM O. CHAPMAN, Judge. Affirmed.

A. R. Titlow, for appellant.

F. R. Baker, for respondent.

The opinion of the court was delivered by

HADLEY, J.—Respondent brought this suit against appellant to recover damages on account of injuries alleged to have been received by reason of a defective street. It is alleged that on the 3d day of March, 1901, and for a long time prior thereto, in A street in the town of Buckley, in the line of travel thereon, and at or near the intersection of said street with the south line of Main street in said town, there was a large and dangerous hole or trench, of which the said town, through its officers and employees, had notice at the time and for several months prior thereto; that said town, through its said officers and employees, upon said date and for several months prior thereto, had knowingly and negligently permitted said hole or trench to remain open and without proper protection or notice to travelers, and had permitted the street at said place to become and remain out of repair and dangerous to travel; that on said date respondent, with other persons, was riding along said street in a light wagon, drawn by a team of gentle horses which were being carefully driven, and that respondent and the other persons in the wagon were wholly unaware of the existence of said hole or trench, the same being then filled and covered with muddy water; that, without any fault or negligence on the part of respondent or of the other persons in said wagon, the team and wagon were driven from the west along said Main street, and turned to go south along said A street, when the front wheels of the

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wagon suddenly dropped into said hole, throwing the occupants of the wagon out, and throwing respondent upon the tongue and whiffletrees of the wagon; that the horses were thereby scared, became uncontrollable, and ran rapidly along said A street, carrying and dragging respondent for the distance of about half a block, when they collided with a tree by the side of the street, causing the neck yoke to be broken and the tongue to drop; that respondent was thereby violently thrown to the ground and against some object, whereby he was bruised, wounded, rendered unconscious, and received severe injuries, which are particularly described in the complaint. Respondent alleges his damages to be \$1,000, based upon loss of time, suffering of body, and great inconvenience. No claim for damages is based upon permanent injuries. A demurrer to the complaint was overruled, and thereupon appellant answered with general denials and affirmatively alleged contributory negligence on the part of respondent and of his traveling mate, a lady who was driving the team. The trial was had before a jury, which resulted in a verdict for \$325 in favor of respondent. Appellant moved for a new trial, which was denied, and judgment was entered for the amount of the verdict and for costs. This appeal is from said judgment.

It is assigned that the court erred in overruling the demurrer to the complaint. Appellant is a municipal corporation of the fourth class, and it is urged that as such it cannot be made liable for personal injuries arising from defective streets, unless there is some statute directly declaring such liability. In *Sutton v. Snohomish*, 11 Wash. 24 (39 Pac. 273, 48 Am. St. Rep. 847), the same argument was advanced by the appellant in the case as applicable to cities of the third class. The court in that case, at pages 27 and 28, said:

"It must be conceded that there is no legislative enactment declaring these cities liable for such negligence as is alleged in the complaint in this action; and it may also be conceded that the appellant city cannot legally be made to respond in damages for negligence in the discharge of purely governmental duties. But it does not necessarily follow from these propositions that the city is exempt from liability in the present case. . . . We think that where, as here, a city has exclusive control and management of its streets, with power to raise money for their construction and repair, a duty (when not expressly imposed by charter) arises to the public from the character of the powers granted to keep its streets in a reasonably safe condition for use in the ordinary modes of travel, and that it is liable to respond in damages to those injured by a neglect to perform such duty."

The court conceded in the above opinion that there is want of harmony among the decisions of the courts upon the question, but declared its belief that the weight of authority is in favor of the view adopted. The principle decided in that case is against appellant's contention here, and makes municipal corporations of the fourth class as liable to respond in damages for injuries from defective streets as a city of any other class.

It is further urged under this assignment that it appears upon the face of the complaint that the negligence of appellant in not filling up the hole in the street was not the proximate cause of respondent's injuries. We do not agree with appellant. We think the allegations of the complaint which are substantially set forth above are such that it must follow, in ordinary reasoning from cause to effect, that the injuries received were the natural and probable consequence of neglect to repair the street. It is true, there was a succession of causes; but that which started them all in motion, as shown by the complaint, was

the negligence of appellant to cause this hole to be filled. Next followed the sudden dropping of the wagon wheels into a deep and dangerous hole, the nature of which was concealed by the standing and muddy water which covered and filled it. This was followed by the natural circumstance that the team of horses, although ordinarily gentle, became frightened and ran, and respondent was thereby injured. Thus the chain of circumstances leading backward from the final effect connects directly with appellant's negligence, and it is not too remote to be called the controlling, and therefore the proximate, cause. It is also insisted that the complaint, upon its face, shows contributory negligence to such a degree that the demurrer should have been sustained. We do not think so, and we find no error in the ruling upon the demurrer.

It is next assigned that the court erred in denying appellant's motion for a nonsuit. This hole was immediately at the lower end of an apron or planked inclined way in A street, leading south from the planked driveway along Main street. The team went leisurely, traveling east along Main street to A street, and then turned and went down this incline to go south along A street. The evidence showed that the depth and extent of the depression were concealed by the standing water, and when the front wheels reached the foot of the inclined way they plunged by a sudden drop into this hole, while the rear wheels were still elevated upon the incline, and thus the occupants were suddenly thrown forward; and the evidence introduced by respondent showed that he was thrown out upon the whiffletrees, and that the horses immediately jumped and ran. It is insisted that the hole was simply a depression in black, muddy soil, filled after a rain with mud and water, due alone to the operation of nature's ele-

ments, and that appellant had no notice thereof. While no direct actual notice was traced by the evidence to any officer or employee of the town, yet there was evidence to the effect that the street at that place had been in much the same condition for some weeks prior to the time of the accident. It was located but a few feet from the main-traveled and planked thoroughfare of the town, and immediately at the end of a bridge-way leading down from it on to a street crossing this main thoroughfare. Under such circumstances, we think the municipality was chargeable with constructive notice of the defect. *Laurie v. Ballard*, 25 Wash. 127 (64 Pac. 906). It is further insisted that respondent's testimony showed that the conditions existing there were apparent, and that the team was deliberately driven into a place of obvious danger. While it did appear that he previously knew and then saw that the place was very muddy, yet it did not appear that he knew of the depth of the depression which occasioned the sudden fall of the wheels, or that he could then see how deep it was; the appearance being that of the level surface of standing water. Whether he was negligent and contributed to the injury was a question concerning which the minds of men might reasonably differ, and was for the jury to determine. *McQuillan v. Seattle*, 10 Wash. 464 (38 Pac. 1119, 45 Am. St. Rep. 799); *Steele v. Northern Pacific Ry. Co.*, 21 Wash. 287 (57 Pac. 820); *Traver v. Spokane St. Ry. Co.*, 25 Wash. 225 (65 Pac. 284); *Jordan v. Seattle*, 26 Wash. 61 (66 Pac. 114); *Burian v. Seattle Electric Co.*, 26 Wash. 606 (67 Pac. 214). We think the nonsuit was properly denied.

The next assignment of error is that the court denied the motion for new trial. A number of questions are discussed under this assignment. It is first urged that error

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was committed in permitting a witness to testify as to complaints made by respondent a few days after the accident, relating to the nature and extent of his injuries. Such evidence is admissible under the following authorities: *Bloomington v. Osterle*, 139 Ill. 120 (28 N. E. 1068); *Board of Commissioners v. Nichols*, 139 Ind. 611 (38 N. E. 526); *Blair v. Madison County*, 81 Iowa, 313 (46 N. W. 1093); *Harris v. Detroit City Ry. Co.*, 76 Mich. 227 (42 N. W. 1111). In *Bloomington v. Osterle*, *supra*, the court, after declaring such testimony to be competent, adds: "The weight of such testimony was for the jury." We think the reason for the rule thus stated is good, and that no error was committed in admitting the evidence.

It is also insisted that error was committed in admitting testimony as to the condition of the street at other places than at the exact point where the accident is alleged to have occurred. The court announced that evidence would be heard as to the condition of the street for a time prior to the accident, confined to within a block of the point where the accident occurred, and at the same time stated that such evidence was admitted as bearing only upon the question of constructive notice to appellant, and for the purpose of showing whether the condition in the immediate vicinity was such that appellant ought to have known of the particular defect. The evidence was admitted in accord with the rule followed in *Laurie v. Ballard*, *supra*, and the court did not err.

A number of objections are urged to the court's instructions. We do not find it necessary to discuss them all, since we think they fairly stated the law of the case, and covered the requests for proper instructions asked by appellant. One instruction, however, presents a question which we think should be discussed. The evidence showed

that respondent, at the time of the accident was riding by invitation with a lady who had asked him to show her the way to respondent's house. The lady was driving the team. General and comprehensive instructions were given to the effect that respondent must have been free from negligence, and the following was also given:

"You are further instructed that, if you find from the evidence in this case that the plaintiff was at the time of the alleged accident riding in a wagon as a guest or companion of some other person who was driving the horses that were dragging the said wagon, and that he exercised and assumed no authority or control over the person so driving or the movements of said team, then any negligence on the part of the person so driving, if any such be shown, could not be imputed to the plaintiff."

The instructions, taken together, made it clear to the jury that there could be no recovery if the respondent himself was negligent, and the question presented by the above-quoted instruction is whether negligence of the driver can be imputed to respondent in the absence of negligence on his own part. There seems to be much lack of harmony in the decisions upon this subject. Where negligence of one riding in a private vehicle concurs with negligence of the driver, it is held that there can be no recovery, but the variance of decision arises in cases where there has been no actual negligence on the part of the person injured who was with the driver. Some courts hold that recovery cannot be had, upon the theory that the one with the driver has constituted him his agent, and that he cannot recover for the neglect of his agent. The following cases, however, hold that when one is a passenger in a private conveyance, the contributory negligence of the driver cannot be imputed to him: *Borough of Carlisle v. Brisbane*, 113 Pa. St. 544 (6 Atl. 372, 57 Am. Rep. 483); *Crampton v.*

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Ivie, 126 N. C. 894 (36 S. E. 351); *Follman v. Mankato*, 35 Minn. 522 (29 N. W. 317); *Brannen v. Kokomo, etc., Co.*, 115 Ind. 115 (17 N. E. 202, 7 Am. St. Rep. 411); *Philadelphia, etc., R. R. Co., v. Hogeland*, 66 Md. 149 (7 Atl. 105, 59 Am. Rep. 159).

The case of *Little v. Hackett*, 116 U. S. 366 (6 Sup. Ct. 391), strongly supports the above doctrine. It was a case of public conveyance with a passenger for hire, and yet the doctrine of the driver's agency was not approved. Many cases might be cited, and many others in support of the doctrine of imputed negligence might also be cited; but it would probably be difficult to determine with which doctrine the weight of authority lies, since the courts seem to be in hopeless discord upon the subject. The rule of the above cases seems to us, however, to be founded in reason and justice. Where one is simply an invited guest of a voluntary driver, we do not believe the latter should be held to be such an agent of the former that the driver's negligence should be imputed to the passenger, when the passenger is without fault, and has no control over the driver or his team. Especially does this seem to be right when considered in relation to one innocent of negligence, where it appears that the accident would not have happened, even with the negligence of the driver contributing, but for the primary neglect of the defendant. The court's instructions, taken together, were in harmony with this rule, and we hold that there was no error therein. The court did not err in denying the motion for a new trial.

It is last assigned that the court erred in including in the judgment at the time it was entered the sum of \$181.40 as respondent's costs, thus rendering the judgment greater than the amount of the verdict. Appellant contends that the inclusion of said amount practically deprived it of its

right to move against the cost bill, since, as it alleges, it would be of no avail to move to retax costs when the judgment had already been entered therefor, and further that, though the costs might be retaxed, still the judgment would stand for the original amount, and appellant's only remedy would be to have the judgment vacated as to the amount of costs included therein. In view of the record, we see no merit in this assignment. The amount of costs was stated in the judgment as a separate item from the amount of the verdict, and could have been changed on motion to retax. Moreover, appellant did move to retax costs, and the court acted upon the motion. Presumably, the court considered all the items, and, since our attention is not called to specific ones as being incorrectly taxed, we will presume that they were properly taxed.

The judgment is affirmed.

MOUNT, ANDERS and DUNBAR, JJ., concur.

31	880
34	388
31	380
339	86

[No. 4226. Decided March 25, 1908.]

FRANK D. GALLAGHER *et ux.*, *Respondents*, v. TOWN OF
BUCKLEY, *Appellant*.

CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF.

In actions for negligence contributory negligence is an affirmative defense, placing the burden of proof upon defendant to establish it.

MUNICIPAL CORPORATIONS — DEFECTIVE STREETS — DUTY AS TO ENTIRE
WIDTH — INJURY TO TRAVELER.

Conceding that it is the duty of a municipal corporation to keep only the traveled portion of a highway in repair, yet a charge to the jury that one traveling upon the street of a town, without any notice of a defect therein, has a right to presume that it is reasonably safe for ordinary travel throughout its

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entire width, would be no more than harmless error, where the evidence did not show that plaintiff's team, in running into a hole in the highway, left entirely that portion of the street which was ordinarily traveled.

TRIAL — INSTRUCTIONS — CURING ERROR.

Error of the court in charging the jury as to permanent injuries to plaintiff in an action to recover for personal injuries in which no claim was set up for permanent injuries, was cured by the court's later instruction to disregard what had been said by him as to permanent injuries and his explanation to the jury that no claim for such injuries was involved in the case.

SAME — ARGUMENT TO JURY — READING FROM LAW BOOKS.

The fact that plaintiff's counsel, in a personal injury case, read to the jury an opinion of the supreme court in a similar case will not be regarded as prejudicial error, when the opinion read was in accord with the law as given by the court to the jury, and when there is nothing to show that the jury may have been misled or the defendant in any way prejudiced thereby.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM O. CHAPMAN, Judge. Affirmed.

A. R. Titlow, for appellant.

F. R. Baker, for respondents.

The opinion of the court was delivered by

HADLEY, J.—This suit was brought by respondents, who are husband and wife, against appellant, a municipal corporation of the fourth class. The action is for the recovery of damages for personal injuries alleged to have been received by respondent Ada May Gallagher by reason of a defective street within the limits of the appellant corporation. A trial was had before a jury, which resulted in a verdict in favor of respondents for the sum of \$1,250. Appellant moved for a new trial, which was denied, and judgment was thereafter entered for the amount of the verdict and for costs. This appeal is from said judgment. The facts and circumstances from which this case arose

are the same as those in case No. 4,259, *Shearer v. Town of Buckley*, ante, p. 370 (72 Pac. 76). Respondent Ada May Gallagher is the lady who is mentioned in the opinion in the above case as the driver of the team at the time the accident occurred. The nature of the issues and the facts developed by the evidence are discussed at some length in that case, and we deem it unnecessary to repeat them here. A number of the errors and legal questions presented by the case at bar were decided in the former case, and we shall not discuss them again here. Some additional questions raised in this case we shall, however, discuss.

It is assigned as error that the court refused to instruct that the burden of proof was upon the respondents to show that respondent Ada May Gallagher was using ordinary care under all the circumstances which were open and apparent to her at the time of the accident. The instruction asked places the burden of proof as to contributory negligence upon the plaintiff in the case. There is conflict of authority as to where the burden of proof lies on this subject, but this court early adopted the rule that contributory negligence is an affirmative defense, and that the burden of proof is upon the defendant. *Spurrier v. Front Street Cable Ry. Co.*, 3 Wash. 659 (29 Pac. 346). The trial court instructed in accordance with the rule of the above case, and therefore did not err in refusing the instruction asked.

It is assigned that the court erred in instructing the jury to the effect that one traveling upon the street of a town, without any notice of a defect therein, has a right, when using due diligence and care, to presume, and to act upon the presumption, that it is reasonably safe for ordinary travel throughout its entire width, and free from all dangerous holes or other defects. Appellant urges that the

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duty to keep in repair so as to meet the reasonable demands of ordinary travel extends only to the traveled path, and not to the entire width of the street. There is conflict of decision upon this subject. Elliott on Roads & Streets (2d ed.), § 621, states the general rule applying to county roads to be that the duty to keep in repair extends only to the traveled path or portion of the way in actual use, provided it is wide enough to be safe. In the same connection, however, the learned author says:

“But it would seem, on principle, that where a city has once improved a street, and leaves it open to the public throughout its entire width, the whole of it must be kept in repair.”

Many cases are cited in support of the above statement of the text. Thus a distinction appears to be drawn between county roads and streets. This court announced its adoption of the above-stated rule as applying to improved streets in *Saylor v. Montesano*, 11 Wash. 328 (39 Pac. 653). It is not very clear from the record in this case whether the street in question was ever improved in any manner for its full width or not; but it is clear that at least a portion of it was open to travel, and that the accident under consideration occurred immediately at the foot of an inclined planked way leading down into the street from the planked way of the main thoroughfare of the town. This inclined bridgeway afforded the only means for getting into the street from said main thoroughfare, and the muddy and dangerous hole where the accident occurred was just at the end of the incline. There was some evidence that the team was driven in a diagonal direction, and guided to the left of a straight course, in the effort to avoid what was supposed to be a worse place, but there was no evidence that they left entirely that portion of the

street which was ordinarily traveled. Certainly a traveler approaching a place of that character must be accorded the right to turn either to the right or to the left in a reasonable effort to avoid an apparently dangerous place which lies immediately in the direct way. Whether this particular street had been so improved that the duty was cast upon the appellant to keep it in repair the entire width, we do not now decide, for want of sufficient facts. But, whatever may be said of the abstract proposition of law included in the instruction criticised, we think it could not have misled or confused the jury in this case, for the reason, as we have seen, that no evidence showed the team to have been driven away from the traveled part of the street; and it is conceded that the traveled portion should be kept in repair. The instruction, under the evidence, could therefore in any event amount to no more than harmless error.

Error is urged in that the court referred to permanent injuries in an instruction, whereas no claim is made in the complaint for permanent injuries. It is claimed that the jury may have been misled thereby. At the conclusion of the instructions, respondents' counsel called the court's attention to this error, and thereupon, before the jury retired, the court instructed them to disregard what had theretofore been said as to permanent injuries, and fully explained that no claim for such injuries is involved in the case. The latter instruction cured the error, and no reason for reversal now exists under this assignment of error.

It is assigned that the court erred in permitting respondents' counsel to read from a law book in his argument to the jury. Counsel states that the entire opinion in *Laurie v. Ballard*, 25 Wash. 127 (64 Pac. 906), was read. Ref-

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erence is made to the discussion upon this subject in *State v. Coella*, 3 Wash. 99 (28 Pac. 28). A somewhat extended discussion is to be found in that opinion. But counsel here insist that it is dictum, and not decisive of any point really involved. We will not now enter upon an analysis of that case to determine how decisive it may be of the point raised here. But it is not improbable that what was said there may have influenced the trial court in the case at bar to permit such reading. It is sufficient to say that the practice of reading from law books to the jury, in jurisdictions where the jury are the judges of the facts alone, and must accept the law as given by the court, is generally criticized and even condemned. It has been often held to be reversible error. We do not approve the practice, and yet we are not prepared to say that a case should be reversed for that reason alone, unless it is manifest that prejudicial effects resulted therefrom. While denouncing the practice, yet the courts in the following cases refused to reverse on that ground where prejudicial effects did not clearly appear: *Steffenson v. Chicago, M. & St. P. Ry. Co.*, 48 Minn. 285 (51 N. W. 610); *Boltz v. Town of Sullivan*, 101 Wis. 608 (77 N. W. 870). In the last named case the court, at page 874, says:

"We disapprove of it, yet it is one of many matters liable to occur in trials, which, though out of harmony with correct methods, do not warrant punishing parties by reversing their judgments. This court can go no further in such situations than to express disapproval and hold the error harmless, leaving trial courts to make their own standard of strictness as to the observation of settled rules and methods of procedure in conducting trials, so long as no substantial right of a complaining party be injuriously affected thereby."

We heartily concur in what is said by the Wisconsin

court, and since, as far as we are advised, the only opinion read upon the trial of the case at bar was in accord with the law given by the court to the jury, we do not see that the jury may have been misled or that appellant was prejudiced thereby. It is urged that the reading of the facts and of the amount of the judgment as having been unreversed by this court may have had the effect to increase the amount of the verdict here. We will not presume so from anything that appears in the record. The jury were carefully instructed that they must look alone to the evidence in this case as the basis of any verdict they should find. We shall presume they did so, under the record.

We have discussed what we believe to be the essential questions in this case not already decided in *Shearer v. Buckley, supra*. Since we think no prejudicial error was committed, the judgment is affirmed.

ANDERS, DUNBAR and MOUNT, JJ., concur.

[No. 4504. Decided March 25, 1903.]

BEN E. SNIPES *et al.*, Appellants, v. DANIEL KELLEHER,
as Administrator, et al., Respondents.

LACHES — ENFORCEMENT OF TRUST.

An agreement whereby a mortgagee was to be permitted to foreclose without opposition on the understanding that he was to make a declaration of trust in the premises in favor of the mortgagor cannot be enforced by reason of the laches of plaintiff, where suit to enforce it was not brought until four months after the death of the alleged trustee, at a date more than seven years after such trustee had acquired title under the foreclosure, the only excuse for delay being that he had promised to execute a declaration of trust at various times, and had refused so to do at a period only three months prior to his death.

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EQUITY — ENFORCEMENT OF FRAUDULENT AGREEMENT.

A court of equity will not lend its aid to declare a trust in favor of plaintiff where it appears that plaintiff, while insolvent, had entered into an agreement with the holder of a first mortgage on his lands, against which there were liens held by a second mortgagee and judgment creditors, that such first mortgagee should foreclose thereon and plaintiff would allow judgment to go by default, after which such mortgagee was to declare a trust in favor of plaintiff; and that the mortgage was foreclosed for the sum of nearly \$17,000 in excess of the amount actually due, without the knowledge of other creditors, and the land sold and bid in for the amount of such excessive judgment.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Affirmed.

Lewis, Hardin & Albertson, Fred Rice Rowell, William Welch and Walter B. Beals, for appellants.

Frederick Bausman, for respondents.

The opinion of the court was delivered by

MOUNT, J.—Appellants denominate the complaint in this action “a bill to redeem.” The prayer is for an accounting between the parties, and that the court determine the amount due defendants under a foreclosure sale by one J. W. Thompson during his life-time, and that upon the payment of the amount found due to defendants the court order certain property described in the complaint conveyed to the plaintiffs. A demurrer to the complaint was sustained. The plaintiffs elected to stand on the allegations thereof, and the cause was dismissed. Plaintiffs appeal.

The facts alleged in the complaint are substantially as follows: In January, 1892, plaintiff Ben E. Snipes and one J. W. Thompson entered into a contract by the terms of which Snipes was to purchase certain real estate in Seattle, and take title thereto in his own name, to be held

in trust for himself, D. B. May, and W. Lair Hill. This real estate was to be platted into town lots and sold. The purchase price of the real estate was \$280,000, and taxes estimated at \$23,000 additional. Thompson agreed to loan to Snipes \$164,874 toward the purchase price of said land, and agreed that when Snipes received title thereto, a mortgage should be executed by Snipes and wife to Thompson to secure the repayment of this amount, with interest at six per cent. per annum. It was also agreed that a deed should be executed to Thompson for twenty of the lots. The mortgage was to be paid out of the net proceeds of the sale of the remainder of the lots, within two years. In accordance with this contract Snipes acquired title to the real estate, deeded the twenty lots named to Thompson and on January 30, 1892, executed a mortgage for the sum of \$164,874, as agreed. Thereafter, in the year 1893, Snipes became insolvent, and thereupon executed to certain of his creditors a second mortgage on the real estate in question. About the same time large judgments were also obtained against Snipes, which judgments became liens on the interest of Snipes in the said real estate. For these reasons Snipes could not sell the lots and make title thereto. He thereupon entered into an oral agreement with said Thompson to the effect that Thompson should proceed to foreclose his first mortgage—the one above named for \$164,874—and obtain title to the property, so that the said Thompson could execute and deliver good and sufficient conveyances to those who might wish to purchase the said lands. Snipes agreed not to make any defense to the foreclosure suit, and Thompson agreed that, upon purchasing the property at foreclosure sale, he would execute a declaration of trust, in which it would be shown that Thompson held the property in trust for Snipes. In accor-

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dance with this last agreement, in November, 1893, Thompson brought suit against Snipes and subsequent mortgagees and judgment creditors to foreclose his mortgage. In his complaint he prayed for some \$16,900 more than was due upon the mortgage, Snipes having paid this amount subsequent to the execution of the mortgage. Snipes made no defense to this action, and permitted the judgment to be taken for the full amount prayed. Judgment was entered on February 26, 1894, for \$187,886.04, and on April 26, 1894, the property was sold to satisfy the same and was bid in by Thompson for the amount of the judgment. Thereafter, on August 9, 1895, a sheriff's deed was issued to the purchaser. It is alleged that, after Thompson acquired the title to the property, Snipes demanded that he execute a declaration of trust; "that many times between January 1, 1895, and July 1, 1901, these demands were made upon Thompson by letters addressed to said Thompson by said Snipes;" that said Thompson promised at divers times between January 1, 1895, and July 1, 1901, that he would execute a declaration of trust; that these promises were made both orally and in writing, "first orally in 1895 and first in writing in 1895, and last orally in 1901 and last in writing in 1901;" but that the said Thompson postponed from time to time the performance of said promises, and that he never in fact performed any of them, and that on or about March 1, 1901, the said Thompson refused to carry out his said promises; that said J. W. Thompson died on or about the first day of July, 1901, leaving surviving him as only heirs the defendants Flora Thompson, his widow, and Ross Thompson and Ida Thompson, children, now past age. The other defendant, Kelleher, is special administrator of the estate. It is also alleged that the value of the real estate in ques-

tion "is now and during all the times herein mentioned" was, more than \$500,000; that, if plaintiff had not relied upon the promises of Thompson herein set out, he would have redeemed the property within one year from the time of sale.

We think the demurrer was properly sustained upon two grounds: (1) Upon the ground of laches, and (2) upon the ground that the complaint does not state a cause of action for which equity affords relief. Counsel for appellants seek to avoid the statute of limitations and the rule of laches by the allegation that the deceased, J. W. Thompson, during his life time, repeatedly promised to make a declaration of trust in writing, but that he postponed the performance of his promise from time to time, and thereby lulled the plaintiff Ben E. Snipes into the belief that he was secure, and was thereby excused from bringing an action to enforce his rights. If these were the only facts alleged, they would probably be sufficient to excuse the delay, under the rule in *Ryan v. Dox*, 34 N. Y. 307 (90 Am. Dec. 696), quoted and relied upon by plaintiffs. But when it is also alleged that the deceased, J. W. Thompson, on March 1, 1901, refused to carry out his promises, and when it further appears that in July (some four months later) Mr. Thompson died, and also that the action was not brought until October 14, 1901 (some three months after Thompson's death), we think under these circumstances, if the rule of laches may not be enforced, it is difficult to understand under what circumstances the rule may be invoked. An action to redeem under the statute was barred in one year after the sale. An action to enforce the oral agreement alleged was barred in two years. But, because of the promises of Thompson to execute the agreement, plaintiffs argue that the

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action could be maintained at any time within two years after refusal. If there were no changed relations of the property or the parties, this argument would probably be correct. In this case the value of the property according to the complaint has not changed. But one of the parties to the oral agreement is dead. He possibly was the only party who knew the contract, if there was one, or who could contradict the evidence of the plaintiff upon the question of a contract. The plaintiffs delayed bringing this action more than six years while Thompson was living. After Thompson positively refused to make a declaration of trust, there was no further excuse for delay. Yet plaintiff neglected to bring his action for a period of four months before Thompson's death, and waited until three months thereafter before an action was begun against his heirs and legal representatives. Under these circumstances the plaintiff has been unreasonably dilatory in enforcing his rights, if he ever had any.

"Where a party has been unreasonably dilatory or negligent in enforcing his rights, and shows no excuse for such laches in asserting them, courts of equity uniformly decline to assist him in their enforcement." Wood, Limitation (3d ed.), p. 155, 137.

Appellant relies upon the case of *Ryan v. Dox*, *supra*, which is quoted at length in the brief. In that case the action was brought during the life time of the defendant, who was alleged to have made the contract. In this case, if Mr. Thompson, who is alleged to have made the contract, were living, we think the action would be in time under the rule there announced; but when the plaintiff has delayed more than six years, and until after the death of the other party to the oral contract, the rule of laches should be applied.

Furthermore, the demurrer was properly sustained be-

cause the complaint failed to state a cause of action against which equity will relieve. The complaint shows that at the time of the foreclosure of the mortgage Thompson was a first mortgagee; that Snipes was insolvent, and had given a second mortgage on the property to secure certain creditors, and also had judgment creditors whose judgments were liens on Snipes' interest in the real estate; that Thompson foreclosed his first mortgage at the request of Snipes, and prayed for \$16,902.88 more than was actually due thereon; that Snipes suffered default, and allowed judgment to be entered for this sum in excess of the amount actually due. There is no allegation that the other creditors of Snipes were informed of this or knew anything about the judgment being excessive. The property was sold and bid in for the amount of the judgment. This was clearly a fraud upon the other creditors of Snipes, and deprived them of their right to protect their claims against Snipes to the extent of \$16,902. These judgments and liens have, no doubt, expired, and cannot now be enforced, which probably affords some reason for the laches above discussed. According to his own allegation, the plaintiff invited and knowingly permitted a fraud to be practiced upon his creditors. For that reason alone he cannot come into a court of equity, and obtain its aid to enforce an agreement begotten in fraud to restore him to the property which, but for the fraud, he must have lost. 1 Pomeroy, Equity Jurisprudence (2d ed.), § 401; 2 Pomeroy, Equity Jurisprudence (2d ed.), §§ 916, 940; Greenwood, Public Policy, p. 169.

The judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY and ANDERS, JJ.,
concur.

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[No. 4412. Decided March 26, 1903.]

MARY C. ROSS, *Respondent*, v. HENRY HOWARD *et al.*,
Appellants.

COMMUNITY PROPERTY — EQUITABLE INTEREST IN LAND — LIABILITY
FOR SEPARATE DEBT OF ONE SPOUSE.

Equitable interests in land, held by a husband and wife as community property, are not subject to sale on an execution issued on a judgment rendered for the separate debt of either spouse.

SAME — DISTINCTION BETWEEN REAL PROPERTY AND REAL ESTATE —
CONSTRUCTION OF STATUTE.

Bal. Code, § 4491, which provides that the husband has the management and control of the "community real property," but shall not sell, convey, or incumber the "community real estate," unless the wife join with him, does not recognize a distinction as existing between "real estate" and "real property," in view of the fact that those terms are used indiscriminately in the several sections of the statute relating to the acquisition and disposition of real property.

CONVEYANCE AS MORTGAGE — PAROL EVIDENCE.

An absolute deed of conveyance, whether in form a warranty or quit-claim, may be shown by parol evidence to be a mortgage.

Appeal from Superior Court, Spokane County.—Hon.
GEORGE W. BELT, Judge. Affirmed.

R. L. Edmiston (*William T. Birdsall*, of counsel), for
appellants.

William S. Lewis, for respondent.

The opinion of the court was delivered by

FULLERTON, C. J.—On June 6, 1898, the respondent and her husband, E. S. Ross, being then the owners of certain real property situate in Spokane county, executed and delivered to one F. E. R. Linfield an instrument in the

form of a ~~warranty~~ deed, purporting to convey the property to her for the consideration of one dollar. On the 15th of June following, the appellant Howard recovered a judgment in the superior court of Spokane county against E. S. Ross, on which he caused a writ of execution to issue, and to be placed in the hands of the other appellant, who was then sheriff of Spokane county, for execution. The sheriff, under the direction of the judgment creditor, levied upon the real property above mentioned, and was proceeding regularly to sell the same when this action was brought to restrain him from so doing. The question of the respondent's right to maintain the action, and the question of the sufficiency of the complaint, were before this court and determined in a former appeal. 25 Wash. 1(64 Pac. 794). After the remittitur went down on the determination of that appeal, issue was joined on the merits of the action, and a trial had, which resulted in a finding to the effect that the deed to the property mentioned was intended to be, and was in fact, a mortgage; that the property was the community property of the respondent and her husband; that the judgment recovered by the appellant Howard was the separate debt of E. S. Ross, and not a lien upon the real property of the community. A judgment restraining the sale of the property, and quieting the title thereto against the apparent lien of the judgment, was thereupon duly entered.

The appellants do not deny that the real property in question was, prior to the execution of the deed from the respondent and her husband to F. E. R. Linfield, the community real estate of the respondent and her husband. Nor do they deny that the debt on which the judgment of the appellant Howard was founded was the separate debt of E. S. Ross. But the contention is, as we understand it,

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that the statute makes a distinction between community *real estate* and community *real property*, protecting the former from sale under execution on a judgment for the separate debt of either spouse, but rendering the latter liable when the separate debt is the debt of the husband. The particular section of the statute which is thought to make this distinction is § 4491 of Ballinger's Code, and reads in part as follows: "The husband has the management and control of the community *real property*, but shall not sell, convey, or encumber the community *real estate*, unless the wife join with him in executing," etc., the instrument of conveyance. It is said that "chattels real, equitable interests in land, etc.," are meant by the term "community real property," while legal title in fee in either spouse constitutes "community real estate"; that as the husband has the management and control of the former, and is forbidden to incumber the latter only, it must follow, analogous to the ruling of this court to the effect that community personal property is subject to sale on execution issued on a judgment rendered on the husband's separate debt, that community real property is also subject to sale; and, further, that the deed from the respondent and her husband to Mrs. Linfield changed their estate in the lands from a legal to an equitable estate, or, as the appellants would have it, from real estate to real property, and thereby rendered it subject to sale to satisfy the husband's separate debt. *Calhoun v. Leary*, 6 Wash. 17 (32 Pac. 1070), is said to maintain this principle. But what we held in that case was that the community's equitable interest in real property could be sold on execution to satisfy a judgment for a community debt, not that it could be so sold to satisfy a judgment for the separate debt of either spouse. This is far from holding that there is a

distinction between community real property and community real estate, or that an equitable interest of a community in real property can be sold to satisfy a separate debt of the husband. Treating the question, therefore, as one of first impression in this court, the distinction sought to be made is, in our opinion entirely unfounded. Aside from the fact that the section of the statute relied on would in itself hardly be consistent if different meanings were to be given to these different terms, the several sections of the statute relating to the acquisition and disposition of real property, and the tenure by which the same is holden, where one or the other of these terms is used, do not leave the matter in doubt. While it would too unduly extend this opinion to set these sections out in detail, their perusal will plainly show that in the legislative mind the terms community real property and community real estate had the same meaning, and that it was the intent of the legislature that the equitable interests in land held by a husband and wife as community property, as well as the legal interest, should not be subject to sale on an execution issued on a judgment rendered for the separate debt of either spouse.

The remaining errors assigned go to the right of the respondent to show that the deed from herself and husband to Mrs. Linfield was a mortgage, and the sufficiency of the evidence to justify the finding that it was a mortgage, if the right exists. These questions are material here only in so far as they affect the right of the respondent to maintain the action, and it may be that the court will not for that reason look so closely into the proofs as it would were the contest between a grantor and grantee. But, be this as it may, it is the settled rule of this court that an absolute deed of conveyance, whether in form a

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warranty or quit-claim, may be shown by parol evidence to be a mortgage. *Wiss v. Stewart*, 16 Wash. 376 (47 Pac. 736); *Anderson v. Stadlmann*, 17 Wash. 433 (49 Pac. 1070); *Ross v. Howard*, 25 Wash. 1 (64 Pac. 794). And the evidence here abundantly justifies the finding that the deed in question was intended as security for money loaned by the grantee to the grantors.

The judgment is affirmed.

MOUNT, DUNBAR and ANDERS, JJ., concur.

[No. 4449. Decided March 26, 1903.]

THE STATE OF WASHINGTON *on the Relation of Mary E. Brown, Respondent*, v. CHARLES R. BROWN, *Appellant*.

JUDGMENT — REVOCATION BEFORE ENTRY — POWER OF COURT.

Under Bal. Code, § 5119, which provides that "all judgments shall be entered by the clerk, subject to the direction of the court," an order of the court though signed and handed to the clerk for entry, does not become a finality until its actual entry, but may be recalled, and modified or annulled, at any time before it has been spread upon the journal.

ALIMONY — EFFECT OF REMARRIAGE OF PARTY BOUND TO PAY.

The subsequent remarriage of a divorced husband will not relieve him from the obligation of a decree to pay alimony for the support of his divorced wife and minor child, even if the additional burdens imposed by such remarriage tend to exhaust his earnings, since his divorced wife and child have a prior claim thereon, until the modification of the decree in a direct proceeding therefor.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

P. F. Quinn, for appellant.

Graves & Graves, for respondent.

The opinion of the court was delivered by

MOUNT, J.—On May 3, 1902, relator filed an affidavit in the superior court of Spokane county, alleging, substantially, that on the 18th day of November, 1897, relator and appellant were divorced by a decree of the superior court of said county; that by the decree the relator was awarded the care and custody of their minor child, and also awarded \$50.00 per month alimony for the support of herself and child; that the appellant has failed to comply with the terms of said decree in that he has not paid relator the sum of \$90 due in accordance with the terms thereof, and has refused so to do, and informed relator that he does not intend to comply therewith; that relator has no other means of support, and that appellant is able to comply with the terms of said decree. On the filing of this affidavit the appellant appeared and filed an answer to the affidavit of relator, by which answer he in substance denied that he had disobeyed the order and decree of November 18, 1897, and alleged that he had endeavored to the best and utmost of his ability to comply therewith; denied that he had informed relator that he intended to disregard the terms of said decree, and denied that relator has no other means of support; alleged that relator has invested, in interest-bearing securities, which interest is paid promptly, the sum of \$1,800, given and transferred to her by appellant prior to the commencement of her action for divorce, and also that relator has a comfortable home in the state of Illinois; that he is entirely unable to perform the conditions of said decree; that since the said decree he has intermarried, and by his changed relation is required to support his present

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family, at an expense of \$95 a month; that he is working at a salary of \$112.50 per month; and has no other source of income. Upon the issues thus made the cause came on for trial on the 16th day of May, 1902. The relator offered in evidence a copy of the decree and rested. The appellant thereupon testified in his own behalf, and rested. Thereupon the cause was continued until the next day when the court heard the argument of counsel for appellant. Counsel for relator did not argue the case, but requested permission of the court for an opportunity to submit a brief of argument and authorities upon the issues involved. The court granted this request. Thereupon the court took the case under advisement and for argument. Upon June 2, 1902, before briefs were submitted to the court, and without notice to relator, the court announced a decision from the bench, finding the defendant unable to pay the alimony, and dismissed the contempt proceedings, at the same time requesting the attorney for appellant to prepare an order to that effect, which was done. The judge signed the order as follows, omitting the title of the cause:

“On this second day of June, 1902, this cause came regularly on for hearing by the court on the petition of relator for the punishment of the defendant as for contempt, or the payment of the amount provided for in the decree heretofore entered, and, after hearing said petition and the argument of counsel, and the court being fully advised in the premises, it is by the court ordered that said petition be and the same is hereby denied, and said proceeding be and the same is hereby dismissed at relator's cost.

Leander H. Prather, Judge.”

On the next morning counsel for relator appeared in court, and stated that he had been informed that the court had rendered a decision in the cause, and, being informed

by the court that he had announced the decision in said cause, counsel for relator made the following statement:

“Your honor will recollect that this matter was taken under advisement subject to the right of counsel to submit briefs of argument and authorities upon the issues involved. We prepared our brief, served the same upon counsel for defendant on May 29th, and have not received his copy in reply as yet, and therefore had no reason to believe that your honor would decide this matter until both briefs were filed. We were not present in court yesterday when the decision was announced and had no notice of such contemplated action. We have here our briefs, and desire an opportunity to submit the same to your honor before this matter is decided.”

Whereupon the court made the following statement and ruling:

“I had forgotten that this matter was to be submitted on briefs, but I now recollect that such order was made. The order that I made yesterday was therefore made through a mistake of that fact. Mr. Clerk, has that order been entered?”

To which the clerk replied, “No, sir.” The court then said: “Very well, you will not enter that order. That order will be withdrawn. The court will withhold its decision until the briefs have been examined.” Thereafter, on the 12th day of June, the court made findings that appellant had neglected and refused to pay the sum of \$90 due under the decree, adjudged him in contempt, and ordered him into custody until the said sum shall be paid according to the terms of said decree. This appeal is prosecuted from this order.

The appellant maintains: (1) That the order signed by the judge on June 2d was a finality, and that the court thereafter had no jurisdiction to make any findings or render a different judgment in the case; and (2) that, if

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the order of June 2d was not final, the court erred in making finding No. 7 requested by relators, and in refusing to find Nos. 6 and 7 requested by appellant.

In *Quareles v. Seattle*, 26 Wash. 226 (66 Pac. 389), this court said:

"There is a clear distinction between the making or rendering of a judgment and its entry. The judgment is made or rendered when the court announces it or signs the judgment, as is the common practice, and returns the signed judgment to counsel. It is entered when it is placed on record by the clerk."

And we held in that case that the judgment became effective as a judgment when it was rendered and filed with the clerk; that the filing by the clerk was the entry. In *Barthrop v. Tucker*, 29 Wash. 666 (70 Pac. 120), we said:

"In *Sears v. Kilbourne*, 28 Wash. 194 (68 Pac. 451), which is probably the last expression of opinion by this court on the subject, where the judgment was affirmed as against an appellant and the sureties on the appeal bond, and an order was afterwards made by this court setting aside the former judgment and entering another judgment to reduce the judgment against the sureties to the amount for which they were liable on their bond, we held that judgment was rendered on the first date, within the meaning of the Code, and we quoted approvingly from 18 Enc. Pl. & Pr., 430, where it is said: 'The rendition and the entry of a judgment are entirely different things. The first is a purely judicial act of the court alone, and must be first in the order of time, while the entry is merely evidence that a judgment has been rendered and it is purely a ministerial act.' So, in this case, the essential thing sought by the plaintiff in the action was the judicial act of announcing or rendering the judgment. Everything that followed, including the preparation by the attorney of the journal entry, its signing by the judge, and the

spreading of the same upon the journal by the clerk, was purely ministerial, evidence simply of the judicial act of the announcement or rendition of the judgment."

In none of these cases was there any question as to when the court lost control of the judgment. The statute, at § 5119, Bal. Code, provides:

"All judgments shall be entered by the clerk, subject to the direction of the court, in the journal, and shall specify clearly the amount to be recovered, the relief granted, or other determination of the action."

In this case, at the time of the trial, the court reserved the cause for further argument, and no definite time was fixed therefor. Subsequently, on June 2d, before the written briefs had been submitted to the judge, and when he had forgotten that he had the case under advisement to be argued on briefs, he made an order dismissing the cause, and the order was handed to the clerk. Before the clerk filed the order or entered the same upon the journal, the court, upon discovering his inadvertence, recalled it, and directed the clerk not to enter it. We think the court clearly had the right to do this at any time before the order was filed or actually entered upon the records. In *Condee v. Barton*, 62 Cal. 1, it is said:

"There is no judgment which is final until a judgment is recorded."

And in *Broder v. Conklin*, 98 Cal. 360 (33 Pac. 211), the court said:

"The judgment which was prepared and signed by Judge Rooney could not be effective as a judgment until it was filed with the clerk. Until then it was but a purpose in the breast of the judge, which could be changed as he might determine. Whether he deposited it in the post-office to be transmitted to the clerk, or himself carried it in person to the office of the clerk, is immaterial. Until

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it was actually filed it did not become a part of the records in the case and consequently was not a judgment."

It is probable that, if the clerk had either filed or entered the order in his journal the order would then have passed beyond the control of the court, except to vacate or modify the same under the statute with reference thereto. But where the same had only been delivered to the clerk, who had not filed it, and no entry thereof was made by him, the court had authority, under the statute above quoted, to direct when it should be entered, or to direct that it should not be entered at all. We therefore think the court did not lose jurisdiction of the proceedings on June 2d, but was authorized thereafter to enter a final judgment upon the merits.

Appellant requested the court to make findings as follows:

"The court finds that the defendant Charles R. Brown, prior to the entry of the decree, turned over to the relator herein all of the property he then possessed of every kind and nature whatever, except only a certain life insurance policy upon his own life, which he subsequently disposed of for the sum of \$1,300 which money (*together with that which was possible to spare out of his said salary*) was paid over to said relator in compliance with and performance of said decree and that he has now no property of any kind or nature out of which he can obtain any money, and the only income he is now receiving is \$112.50 salary as aforesaid; that his family expenses now and for a long time have been \$95 per month as follows, to-wit: "House rent \$20; light and fuel \$5; provisions \$45; clothing \$20; incidental expenses \$5; (*all of which is necessarily required for the maintenance and support of his present family.*)"

The court made this finding, except the words italicized and included in brackets, which were found not true. The

court also refused to find, "that the defendant has made an honest effort to comply with and perform the decree aforesaid, but is unable to do so," but found as follows:

"That Charles R. Brown is able to comply with said decree and is able to pay relator for her maintenance and support and the support of her minor child, the sum of \$50 for each and every month, and that said defendant has willfully disobeyed the order of said court by failing and refusing to pay relator the sum of \$50 per month as required and provided by said decree."

The appellant was the only witness in his own behalf, and he testified, substantially, that he was employed as paying teller in a bank at Spokane at a monthly salary of \$112.50; that he is a married man, was married about three and one-half years prior to the trial, and has no other income than his salary, and no property; that at the time of the decree of divorce he cashed an insurance policy on his life, on which he realized the sum of \$1,300; that with this money, and what he could spare from his salary, he had paid the alimony since the decree; that he has no money now except his salary; that the expenses of himself and wife actually necessary were \$95 per month, itemizing these expenses; that his salary and position now are the same as when the decree of divorce was rendered. He also admitted that the sum of \$90 was then due according to the terms of the decree, and that he had refused to pay more than \$35 per month because he was unable to do so. This evidence went only to the ability of the appellant to pay the \$50 per month. He admitted that he was earning \$112.50 per month, and that his income had not changed since the decree of divorce was rendered. The only change in his financial condition is that the \$1,300 which he received about the time of the decree has been consumed, and the further change that he has since re-

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married. He testifies that the necessary expenses of himself and present wife are \$95 per month. The decree of divorce fixed the amount which appellant must pay to respondent. That decree is final until it is modified, and must be complied with by the appellant so long as he is able to do so. It cannot be collaterally attacked or modified in this proceeding. A failure to comply with the terms of the decree subjects the appellant to the penalty for contempt unless he shows his inability to perform the terms thereof. When it is shown that he receives a monthly salary of \$112.50, his ability to pay \$50 is certainly shown, unless prior claims thereon are shown. None are shown here. While the appellant, under the law of this state, may after the decree of divorce legally remarry, the fact of a subsequent remarriage cannot relieve him of the obligation fixed by the decree. If his monthly income after divorce was sufficient to support himself alone and to pay his divorced wife the alimony allowed, he could not by his subsequent marriage set aside the decree, or be heard to say that the additional burdens which he himself thereby assumed made him unable to comply with the decree. The divorced wife and minor child have a fixed and prior claim upon the earnings of appellant, which appellant for his own comfort may not take away. We think the findings made were correct.

The judgment is therefore affirmed.

DUNBAR and HADLEY, JJ., concur.

FULLERTON, C. J., and ANDERS, JJ., dissent.

[No. 4478. Decided March 26, 1908.]

SIMON KREIELSHEIMER *et al.*, Respondents, v. O. J. NELSON *et al.*, Appellants.

NEW TRIAL — AMENDMENT OF MOTION.

Amendments to a motion for a new trial are allowable after the motion has been made

SAME—DISCRETION AS TO GRANTING MOTION.

The granting of a new trial is a matter so discretionary with the trial court, that its action will not be interfered with on appeal, unless it plainly appears that such discretion has been abused.

Appeal from Superior Court, King County.—HON. GEORGE MEADE EMORY, Judge. Affirmed.

William Martin, for appellants.

Allen, Allen & Stratton, for respondents.

PER CURIAM.—This is an appeal from the judgment of the court granting motion for a new trial, on the ground of newly discovered evidence. It is objected that the court erred in allowing the respondents to amend their motion for a new trial after the same had been made. This question was decided against the contention of the appellants in *Bailey v. Drake*, 12 Wash. 99 (40 Pac. 631). It is also urged that, even if the amendment were properly allowed, no sufficient showing for a new trial was made, as the evidence offered was merely cumulative. We have uniformly held that the granting of a new trial was a matter so discretionary with the trial court that this court would not interfere unless it plainly appeared that such discretion was abused. We are not able to say that the court abused its discretion in the granting of this motion. *State v. Stowe*, 3 Wash. 206 (28 Pac. 337, 14 L. R. A. 609). Neither are we

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prepared to say that the complaint did not state a cause of action.

The judgment is affirmed.

[No. 4485. Decided March 26, 1903.]

AMERICAN BRIDGE COMPANY of New York, Respondent, v. D. A. ROBINSON *et al.*, Appellants.

NONSUIT — SUFFICIENCY OF EVIDENCE.

In an action to recover the value of iron plates furnished defendants for use in a structure, a nonsuit was properly denied, when defendants' contention, that the contract called for curved plates, ready for adjustment, while only flat ones were furnished, was not supported by the written contract, and there was a conflict in the expert testimony as to whether or not the detail plans and drawings called for bent plates.

TRIAL — HARMLESS ERROR — RECALLING WITNESS.

Recalling a witness after a trial had closed, for the purpose of permitting him to deny a statement attributed to him by another witness, would not be ground for reversal, in the absence of a showing that the adverse party was prejudiced thereby.

Appeal from Superior Court, Adams County.—HON. CHARLES H. NEAL, Judge. Affirmed.

John P. Hartman, for appellants.

Bausman & Kelleher, for respondent.

PER CURIAM.—This is an action to foreclose a lien for material used in the construction of a grain tank. Appellant Robinson was the contractor who built the grain tank for his co-appellant, Ritzville Flouring Mills. He entered into a written contract with respondent's assignor to furnish certain structural iron and steel to be used in constructing the tank, the same to be fur-

nished according to plans and specifications which were approved by said Robinson. The contract price was \$2,260; no part of which having been paid, this suit was brought to obtain a personal judgment against said Robinson, and to foreclose a lien for the amount upon the said tank and the land upon which it is situate. The answer alleges facts upon which a counterclaim of \$354.65 is claimed, and it is alleged that, including interest, a balance of \$1,912.85 only is due. A tender of \$2,000 was made and refused, which tender was renewed in court. The cause was tried by the court without a jury, and judgment rendered in favor of respondent for \$2,251.75, together with attorney's fees and costs. From said judgment this appeal was taken.

Error is urged upon the refusal to grant appellants' motion for a nonsuit. We think the evidence introduced by respondent was such that the motion was properly denied. The assignments of error are chiefly confined to the court's findings and conclusions and to its refusal to find as requested. The court allowed certain claims of appellants, amounting to \$109.25, but found an amount still due in excess of the tender, and gave judgment for the whole, including interest, less said last-named sum. The contention is that the court erred in its findings as to the other items claimed. The chief contention is that the contract provided for furnishing the plates which surrounded the tank, curved, ready to be adjusted to the circular form of the structure, and that, inasmuch as they were shipped not curved, but as straight or flat plates, appellants were required to incur additional expense for scaffolding and otherwise in order to bend the plates and put them in place. The written words of the contract are entirely silent upon this subject, but it is urged that the detail plans and drawings which are a part of the contract call for these plates to

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be bent or curved. We have examined the drawings and plans which are brought here with the record, and we are unable to satisfy ourselves that they so provide. Whether they would ordinarily be so construed by mechanical experts or not, we do not know. Witnesses in this case, who appear to be experts, are not in accord upon the subject. As far as we are able to understand the drawings and what is written thereon, we are unwilling, from that evidence alone, to disturb the court's findings, especially in view of the fact that the written words of the contract make no mention of the matter. The court found that it is not customary to furnish such plates bent, and that if they were bent by the manufacturer, their thinness and lightness are such that they would not retain any curvature given them, but would tend to resume their original flatness. The testimony is very conflicting upon this subject and upon other points found by the court. We have carefully read the testimony, and are unwilling to say that the preponderance is against the findings upon any point. We shall, therefore, not disturb them.

It is assigned that the court erred in permitting respondent to recall a witness after the trial had closed and after appellants' witnesses had left the place of trial. The only testimony elicited, however, was a simple denial of a statement made by Mr. Robinson while upon the witness stand as to something he claimed the witness had said to him. We do not see that appellants were prejudiced thereby. The matter was largely in the discretion of the court, and, unless there was manifest prejudice to appellants' rights, it is not ground for reversal. If appellants were seriously surprised, there is no request shown in the record for a continuance or for opportunity to submit further testimony. Under such circumstances, we think the court did not commit prejudicial error.

The judgment is affirmed.

[No. 4584. Decided March 26, 1903.]

THE STATE OF WASHINGTON *on the Relation of Port Orchard Investment Company* v. SUPERIOR COURT OF KITSAP COUNTY.

PROHIBITION, WRIT OF — REMEDY BY APPEAL.

The writ of prohibition will not issue to restrain a superior court from proceeding with an action which it had refused to dismiss for want of jurisdiction, as the party aggrieved has an adequate remedy by appeal.

Original Application for Prohibition.

Frank D. Nash and William C. Keith, for relator.

Kerr & McCord for respondent.

PER CURIAM.—W. B. Pease, a stockholder in the Port Orchard Investment Company, a corporation, brought an action in the superior court of Kitsap county against that company and one Fitzhugh Henderson to remove a cloud from and quiet title to certain real property situated in Kitsap county. The cloud consisted of a deed and contract made between the corporation and Henderson, pursuant to a decree of the superior court of Pierce county, which he alleges was collusive and fraudulent. The defendants appeared specially, and moved the trial court to dismiss the action for want of jurisdiction. The motion was denied, and they apply to this court for a writ prohibiting the court from proceeding with the action. The application must be denied. This court has repeatedly held that it will not interfere by the extraordinary writ of prohibition when the party claiming to be aggrieved has an adequate remedy by appeal, whether the grievance complained of be want of jurisdiction in the trial court, or acts in ex-

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cess of jurisdiction. This application falls within the rule. There is an adequate remedy by appeal for any error the trial court may have committed in denying the motion to dismiss the proceedings.

Application denied.

[No. 4800. Decided March 28, 1903.]

CORA E. SUMMERVILLE, *Respondent*, v. WILLIAM J. SUMMERVILLE, *Appellant*.

DIVORCE — RESIDENCE OF PLAINTIFF.

Residence in the state and county a year prior to an action for a divorce is sufficiently established by evidence showing that plaintiff took up her residence in Seattle some twenty months prior to the commencement of action, and that, while she had been out of the state a portion of the time, it had merely been for employment, her baby having been left within the state and it having been her constant intention to make Seattle her home.

SAME — PROOF OF MARRIAGE — SUFFICIENCY OF EVIDENCE.

Upon an issue in a divorce case as to the marriage of the parties, the fact of marriage is sufficiently established, as against the husband's claim that merely a contract therefor was entered into which was void under the law of the place, where the undisputed evidence shows that they cohabited as man and wife, and held themselves out to the public as sustaining that relation, during which time they had offspring as the result of their union; and, upon the disputed question of whether a marriage ceremony preceded their cohabitation, the wife was sustained by corroborating circumstances in favor of such contention, while the husband, who contradicted her, was impeached in several particulars while giving testimony.

Appeal from Superior Court, King County.—HON. ARTHUR E. GRIFFIN, Judge. *Affirmed*.

P. V. Davis and *William A. Gilmore*, for appellant.

Byers & Byers, for respondent.

31	411
63	616
31	411
39	226

The opinion of the court was delivered by

HADLEY, J.—Respondent brought this action against appellant for divorce and alimony. The complaint alleges that the two were married at Lake Linderman, in British Columbia, on June 18, 1898; that a child, two years of age at the time the complaint was drawn, was born as the issue of the marriage; that on or about August, 1899, appellant sent respondent out from Dawson City, where they were then residing, together with the child, then three months old, and stated to respondent that he would send her money, and that he would also come out later in the autumn; that appellant did not come out, and has never sent respondent any funds of any kind since said date; that he has wholly deserted and abandoned her, and has contributed nothing for her support or that of her child, since August, 1899. The answer denies the marriage, and denies that respondent was a resident of King county at the time the action was commenced, or that she had resided in this state for one year immediately preceding the commencement of the action. The paternity of the child is admitted, and it is affirmatively alleged that by mutual agreement the two cohabited together during the summer of 1898 at Lake Linderman, aforesaid, and that they thereafter went to Dawson City, and there lived together until about the month of August, 1899, when they mutually consented to separate forever; that appellant then gave respondent one-half of all the property and money he then owned; and that it was further agreed that neither should have any claim against the other for any property thereafter accumulated by either, including any claim for alimony against appellant. These allegations are denied by the reply, and upon these issues the cause was tried by the court without a jury, resulting in a decree of divorce in favor of respondent, awarding her

the custody of the child and \$20 per month alimony, to be paid monthly by appellant. From said decree this appeal was taken.

It is insisted, first, that respondent failed to establish that she had been a resident for the required time before bringing the action. The suit was commenced in May, 1901. The evidence showed that respondent came out from Dawson in the summer of 1899. Much of the time following until this suit was begun she spent in Seattle. During a portion of the time she was in Victoria, where she says she went for employment. She testified, however, that her child meanwhile remained in Seattle, and that it was her constant intention to make Seattle her home. We think the evidence was sufficient to establish residence for a sufficient length of time to give the court jurisdiction.

Appellant's main contention is that respondent failed to establish the marriage. She was very young at the time of the alleged marriage, being not quite sixteen years of age. She testified that in the spring of 1898 she and her mother were together at Lake Linderman, where they met appellant. Appellant's own testimony shows that he was then about thirty-five years of age. Respondent says that while at Lake Linderman they agreed to be married, and that afterwards appellant took her before some one whom she believed to be a clergyman, and who performed the marriage ceremony between them. She says she really was excited at the time, and cannot well remember all that occurred. She saw no marriage license or marriage certificate. She testifies that from that time she and appellant lived together as husband and wife, her mother also living with them. Appellant denies her statements about the marriage ceremony, but admits that they began living and cohabiting together at Lake Linderman, and that the

mother lived with them. They afterwards all went to Dawson together, where the two continued to sustain the relation already established, and meantime the child was born. Another witness, who was at Dawson at the time, testified that appellant introduced respondent there as his wife, and that she was held out by him as being such. Still another witness, who was at appellant's house in Dawson, says that while there appellant asked respondent to bring the baby down from upstairs, and he then told the witness that the child was his, as did also the mother of respondent. The witness does not say that appellant told him in so many words that the mother of the child was his wife, but that in the manner above he held her out as being such. There was no record evidence of the marriage introduced. Respondent's testimony is supported only by the circumstances detailed above, and by further circumstances occurring at the trial, having at least a tendency to impeach the testimony of appellant. A letter addressed to respondent after she left Dawson was shown him, in which she was addressed as the wife of the writer. The writer also designates himself at the close of the letter as "Hubby," uses many endearing terms towards respondent, and expresses much solicitude about the health and welfare of the child. Appellant denied that he wrote the letter. He was asked, while on the witness stand, to write certain words from dictation, which he did. The words were extracts from the letter. The newly written words bore much the same general appearance as those in the letter, notably in the matter of a misspelled word; the word "both" being in each instance spelled "boatn." Another letter received by respondent closes with what purports to be the signature of appellant. That signature, by comparison with another in the record, admittedly genuine, appears to be that of appellant. The

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writing in the body of the last-named letter appears to have been written by the same person who wrote the first-mentioned one. All the circumstances stated above, together with the further fact that appellant is flatly disputed by disinterested witnesses when he denies that he introduced and held out respondent as his wife at Dawson, must have led the trial court to the belief that he was impeached. Appellant was before the trial court, who observed his manner of testifying, and from anything which appears in the record we shall not say that the conclusion was incorrect. If appellant's testimony as to the fact of a marriage is not given weight, then the only direct evidence as to the fact is that of respondent.

Appellant takes the position that no more than a contract marriage was shown, and seems to assume that such was all that respondent meant to prove. He asserts that the alleged marriage occurred in British Columbia; that under the laws of England a contract marriage is void; that such was the law in 1858, when the Province of British Columbia adopted the English civil law as it then stood; and that such a marriage has, therefore, never since been valid in British Columbia. But, be that as it may, appellant is in error when he assumes that respondent undertook to prove only a common-law marriage. She introduced evidence of the performance of a regular, lawful marriage ceremony, and further evidence of subsequent cohabitation in substantiation of the fact that such a marriage had taken place. The intentment of the law is to presume from such testimony that a valid marriage existed, and, when such facts appear in evidence, the burden of proof is cast upon the party denying it to clearly show the contrary.

“Every intentment of the law leans to matrimony. When a marriage has been shown in evidence, whether

regular or irregular, and whatever the form of the proofs, the law raises a strong presumption of its legality,—not only casting the burden of proof on the party objecting, but requiring him throughout, in every particular, to make plain, against the constant pressure of this presumption, the truth of law and fact that it is illegal and void. . . . It being for the highest good of the parties, of the children, and of the community, that all intercourse between the sexes in form matrimonial should be such in fact, the law, when administered by enlightened judges, seizes upon all probabilities, and presses into its service all things else which can help it, in each particular case, to sustain the marriage, and repel the conclusion of unlawful commerce." 1 Bishop, Marriage, Divorce & Separation, § 956.

Again, the same author, in § 959 of the same volume, says:

"If a ceremony of marriage appears in evidence, it is presumed to have been rightly performed, and to have been preceded by all the needful preliminaries."

A marriage ceremony appeared in evidence in the case at bar. It is true appellant denied that there was any ceremony, but the court must have disbelieved him, and with that disposition of the testimony the fact of the ceremony stands established by the evidence of respondent. It follows from the rule stated by the learned author above that "all the needful preliminaries" are presumed to have preceded the ceremony, in the absence of convincing proof to the contrary. A valid marriage may be presumed to exist from general reputation among the acquaintances of the parties that such is the fact, when that reputation is accompanied by their cohabitation, and arises from their holding themselves out to the world as occupying that relation to which the law refers when marriage is mentioned. *Wallace's Case*, 49 N. J. Eq. 530 (25 Atl. 280); *White v. White*, 82 Cal.

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427 (23 Pac. 276, 7 L. R. A. 799); *Murray v. Murray*, 6 Ore. 26; *Arthur v. Broadnax*, 3 Ala. 557 (37 Am. Dec. 707); Underhill, Evidence, p. 158, § 114. The exception to the rule that marriage may be presumed from evidence of cohabitation and repute is where a public or criminal offense is involved. The exception is based upon the ground that the presumption of marriage without proof of actual marriage cannot overcome the stronger presumption of innocence. *White v. White*, *supra*; *State v. Hodgskins*, 19 Me. 155 (36 Am. Dec. 742); Stewart, Marriage & Divorce, § 126. The exception to the rule does not apply in this case, since it is a civil action. Upon the contrary, however, since the ordinary relations attending marriage existed between the parties, and since appellant admits that he is the father of the child, the law indulges every reasonable intendment, probability, and presumption in aid of the testimony that a marriage ceremony was performed, to the end that the innocence of the parties and the legitimacy of their child may be established.

The amount of money allowed by the court was reasonable under the evidence. We find no reversible error, and the judgment is affirmed.

FULLERTON, C. J., and MOUNT, DUNBAR and ANDERS, JJ., concur.

[No. 4441. Decided March 28, 1903.]

JOHN MOYNAHAN, *Respondent*, v. INTERSTATE MINING,
MILLING AND DEVELOPMENT COMPANY, *Appellant*.

PLEADING — OBJECTIONS — ESTOPPEL AFTER VERDICT.

After verdict a party is estopped to claim that the failure of an adverse party to deny certain allegations in his pleading

amounts to an admission of their truth, where he not only went to trial as if the allegations had been denied, but introduced evidence to support their truth, and made no objection when counter evidence was offered, or when the question was submitted to the jury for their determination.

APPEAL — SUFFICIENCY OF EVIDENCE.

The weight and sufficiency of the evidence is always a question for the jury, where there is a substantial conflict; and, in such case, the judgment should be affirmed, although the appellate court may be satisfied that the evidence would have permitted a different verdict.

CONTRACT OF EMPLOYMENT — BREACH — ACTION FOR DISCHARGE — INSTRUCTIONS.

Where, in an action to recover upon a contract of employment, evidence that plaintiff began work at an earlier date than that fixed by the written contract had been excluded on the ground that it was a variation of a written instrument by parol, it was error for the court to charge the jury upon the question of defendant's liability by reason of the plaintiff having entered upon the services at a date earlier than the written contract.

SAME.

In an action to recover upon a contract of employment from which plaintiff had been discharged without the sixty days' notice provided by contract being given, the defense being that such a course was warranted by his gross breaches of contract, it was error to charge the jury that if the plaintiff was in the performance of his duties under the contract in good faith, in all its material particulars, "at the time" the defendant discharged him, then he could recover.

SAME.

Where the defendant, in order to justify the summary discharge of plaintiff, who was working for it under a contract of employment as its superintendent, had introduced evidence tending to show that plaintiff employed one dissolute woman as a cook and suffered another to occupy a house on the company's premises, and that he did not conduct himself properly with these women, it was error for the court, instead of treating the matter as an issue of fact for the jury to determine, to charge them that the question of plaintiff's moral or immoral conduct had nothing to do with whether he had discharged his duties under the contract.

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SAME — WAIVER OF NEGLECT OF DUTY.

Where, in an action to recover upon a contract of employment, defendant had counterclaimed for money overpaid to plaintiff for time when he was not engaged in the services of defendant, a charge to the jury that "any payment by the defendant to the plaintiff for any services during any particular time would be a waiver of any fact of absence or neglect or failure to discharge his duties during that time, which had come to the knowledge of the defendant before the payment for that time," was misleading, in view of the fact that plaintiff had paid himself monthly out of the defendant's funds in his hands, and defendant would not be estopped by the fact of payment, unless it had knowledge that there was a failure to discharge the duties for the particular time, knowledge that the time was paid for, and a delay for an unreasonable time in demanding repayment.

Appeal from Superior Court, Spokane County.—
HON. LEANDER H. PRATHER, Judge. Reversed.

Danson & Huneke and H. S. Stoolfire, for appellant.

James Dawson, for respondent.

The opinion of the court was delivered by

FULLERTON, C. J.—Under date of January 16, 1900, the appellant and respondent entered into a written contract by which the appellant employed the respondent to act as superintendent of its mining properties, situated in the Meyers Creek mining district, in this state, at an annual salary of \$3,600, payable in monthly installments of \$300 each, on the last day of each month. The contract stated in general terms the duties of the respondent. He was to devote his entire time and best judgment toward forwarding the interests of the company; to employ, subject to the approval of the general manager of the company, such help at such wages as his judgment dictated; to keep accounts of the business, and submit the same monthly to the secretary of the company; and to make weekly, in writing, duplicate re-

ports of the progress of the work, and forward one of such reports to the president, and the other to the general manager. The contract further provided that "Either party to this agreement shall have a right to terminate the same by giving to the other party sixty days' notice in writing of his or its intention so to do." The respondent entered upon his duties as superintendent in the month of January, 1900, and continued to act as such until the 18th day of June of the same year, when he was notified by the company that his services were no longer required. He disputed the right of the company to discharge him, and, with the aid of his son, undertook to hold possession of the mining property until a full year's salary should be paid him. Five days later, however, on June 23d, he surrendered the property to the appellant. At the time he surrendered the property he had been paid a salary from January 1st to June 1st. He brought this action to recover for the balance of the salary claimed to be due, and for damages for an alleged wrongful discharge. The jury returned a verdict in his favor for \$793.10, for which amount, with the costs of the action, judgment in his favor was afterwards rendered. The appeal is from that judgment.

It is first assigned that the court erred in refusing to grant the appellant's motion for a new trial. Under this assignment the appellant seeks to raise the question of the sufficiency of the pleadings. In his complaint the respondent alleged that he had been wrongfully discharged by the appellant. In the answer the appellant denied this allegation, intermixing with his denials an allegation to the effect that the respondent was discharged because he had violated every provision of the contract; enumerating in a general way the acts and omissions which it deemed such a violation. Further on, by way of a further and separate answer, the appellant

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repeated these allegations as a justification for discharging the respondent without giving him the sixty days' notice required by the contract. The reply denied the allegations contained in the further and separate answer, but was silent as to them where they first appeared. The appellant insists now that the failure to deny these allegations amounted to an admission of their truth; that they stated facts justifying the respondent's discharge, and consequently it was error to permit the respondent to recover. Without determining whether or not the reply was sufficient to put in issue these allegations, had the question been raised at the proper time, we are clear that the appellant is now estopped from claiming that they were not in issue. It not only went to trial as if the allegations had been denied, but introduced evidence to support their truth, and made no objection when counter evidence was offered, or when the question was submitted to the jury for their determination. After verdict it was too late to claim there was no issue as to these matters.

Further, under this assignment, the appellant contends that the evidence was insufficient to justify the verdict. Clearly, there was evidence which would have sustained a different finding on the part of the jury; and, were we permitted to review the case on the evidence, it may be that we would reach a different conclusion from that reached by the jury. But this does not justify a reversal. The weight and sufficiency of the evidence is always a question for the jury where there is a substantial conflict, and we find in this case such a substantial conflict on every material issue made by the pleadings.

The contract, it will be noticed, bore date as of the 16th day of January, 1900. The respondent at the end of that month paid himself a full month's salary, name-

ly, \$300; reporting the payment in his statement of account for that month which he was required to forward to the secretary of the appellant company. The appellant, as one of its items of counterclaim, charged the respondent with \$150; claiming that he had overpaid himself that amount on this January payment. The respondent had alleged in his complaint that he began work on January 1, 1900, which the appellant denied: setting out the contract and averring that it was entered into on the day it bore date. When the respondent sought to offer evidence on this subject, an objection was interposed and sustained on the ground that the written contract could not be varied by parol. The court, however, gave the jury the following instruction:

"This contract, gentlemen, I charge you, is a contract for a year's services from its date; I charge you, however, as to the time of the beginning of the services of the plaintiff, if you should find from the evidence that plaintiff begun services there at an earlier date, and that they were paid for by the defendant, you may find that it was considered and agreed between the parties, that the services should begin at said date, as it already actually began, and which he was actually paid for without objection."

The appellant assigns this as error; contending that it is an incorrect statement of the law, considered as an abstract proposition, and particularly incorrect when applied to the facts of this case. It seems to us that the instruction is subject to criticism. In the first place, though perhaps not very material here, the contract was not a contract for a year's service, but one for an indefinite period, terminable at the option of either party by giving the other sixty days' notice. In the next place, it is so confusing in its language as to leave in doubt its precise meaning. While it does tell the jury, if they

find certain facts, that certain others may be properly deduced therefrom, yet it is capable of being construed as telling the jury that these facts actually existed. But the error lies in instructing the jury on the subject at all after ruling out the evidence offered in support of it. True, it was made to appear by evidence given to support or defeat other contentions that the respondent began work earlier than the 16th of January; but to treat this, in the instructions to the jury, as evidence tending to show an agreement to pay for such services, or a waiver of an overdraft on the part of the respondent clearly shown by the contract, was to mislead the appellant. It had the right to suppose the matter not in issue, and offered no evidence in explanation of it. The court's action deprived it of this substantial right.

Charging the jury on the subject of terminating the contract, the court said:

"Now I charge you that if either party to this contract violated its terms in any material respect, then the other party had a right thereupon to consider the contract at an end, and this 60 days' notice should not be required, but when the parties to this contract, during the time when the parties to this contract were in the performance of it in good faith, in its terms, then during such time neither party could have the right to terminate it without giving the 60 days' notice as provided in the contract."

Again in the instruction following this he said:

"I charge you further that if you should find from the evidence that the defendant gave notice to the plaintiff that the contract was then terminated or ended, and to turn over the goods of the defendant to somebody else, and you also find that during that time and at that time the plaintiff was discharging his duties under the contract in all of its material particulars, then" the discharge was wrongful.

In the next paragraph of the charge similar language

was used. It will be noticed that the court here says that if the respondent was in the performance of his duties under the contract in good faith, in all of its material particulars, at the time the appellant discharged him, then his discharge was wrongful, and he was entitled to recover for the extra sixty days; in other words, it mattered not how negligent he had been before, or how many times or in how many ways he had violated the terms of the contract, if, as a matter of fact, he was performing it according to its terms at the very moment of his discharge, then the discharge was wrongful. Manifestly this is not the law. The appellant could, of course, condone a breach of the contract on the part of the respondent. It might be held to have done so, were it shown that it had passed it by in silence for an unreasonable time after knowledge of all the facts. But gross breaches of the contract, such as are charged here, are not to be overlooked because the respondent was in the performance of his duties at the time he was discharged. Something tending to show condonation of the fault, such as lapse of time after knowledge of the breach or other conduct inconsistent with a right to claim a forfeiture, must appear, before such a result follows.

The appellant, to justify its summary discharge of the respondent, introduced evidence tending to show that the respondent had hired one dissolute woman as a cook, and had suffered another to occupy a house on the premises of the company rent free, furnishing her with wood at the appellant's expense, and allowing her to use other of the company's property. It was in evidence, also, that the appellant had not at all times conducted himself properly with these women. All this was emphatically denied by the respondent, and he has much corroboration in the tes-

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timony of other witnesses. The court, however, instead of treating it as an issue of fact to be determined by the jury, gave them the following instruction:

“ In determining whether or not the plaintiff was in the performance of the terms of his contract, it would make no difference to the defendant whether the plaintiff was a moral or immoral man, or was acting in a moral or immoral way, excepting so far as it might be if you should find from the evidence that his immorality, if there was any upon his part, prevented him in any way from discharging his duties, the duties of his contract; that is, the mere fact of his being an immoral man or keeping immoral company, if that were the fact, could not be considered by you in determining whether or not he had been in the discharge of his duties under the contract.”

This was error. It was implied in the contract of employment that the respondent should conduct himself when around the premises with ordinary decency, and if he was guilty of the acts charged against him his discharge was justifiable, and he could not recover as for a breach of the contract. The court should have submitted the question of fact to the jury, charging them to find against or for the respondent as they found the charge to be true or untrue.

A part of appellant's counterclaim was for money the respondent had paid himself for time when he was absent from and not engaged in the services of the company. On this subject, the court gave the jury the following instruction:

“Any payment by the defendant to the plaintiff for any services during any particular time would be a waiver of any fact of absence or neglect or failure to discharge his duties during that time, which had come to the knowledge of the defendant before the payment for that time, and if you should find from the evidence that, during any part of the time of plaintiff's services under the contract, he was

absent attending to his own business and neglecting the business of the company the plaintiff could not recover for such time; but if you should find from the evidence that the company defendant, knowing the facts in the case, notwithstanding paid the plaintiff for that time, it would be a waiver of those facts and could not be charged against the plaintiff thereafter."

This was clearly misleading. When it is remembered that the appellant paid himself out of the company's funds at the end of each month his salary for that month, the court's charge is equivalent to saying the appellant cannot recover on these counts at all. Such is not the law. There must be knowledge of the fact that there was a failure to discharge the duties for the particular time, knowledge that the time was paid for, and a delay in demanding it back for an unreasonable time thereafter, before there could be said to be an estoppel by acquiescence on the part of the appellant. The other errors assigned deserve no special notice. Perhaps the court in one or two instances more narrowly restricted the cross-examination of certain witnesses than it ought to have done, but, as these same conditions can hardly recur on a new trial, it is not necessary to specially mention the instances here.

The judgment is reversed, and the cause remanded for a new trial.

MOUNT, DUNBAR and ANDERS, JJ., concur.

[No. 4456. Decided March 28, 1903.]

IDA MARKS, *Appellant*, v. C. F. PENCE, *Respondent*.

MECHANIC'S LIEN — FORECLOSURE — PERSONAL JUDGMENT — ENFORCEMENT CONFINED TO DEFICIENCY.

Under Laws 1893, p. 37, § 12, one who has obtained a judgment of foreclosure of a mechanic's lien, together with a per-

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sonal judgment in the same proceeding against the party liable, cannot in the first instance issue a general execution on the personal judgment, but must first, under a special execution, sell the property upon which it is adjudged he has a lien, credit the proceeds thereof on his judgment, and issue a general execution for the balance, before other property than that liened upon can be seized and sold.

Appeal from Superior Court, Spokane County.—Hon. GEORGE W. BELT, Judge. Reversed.

Robertson, Miller & Rosenhaupt, for appellant.

P. C. Shine, for respondent.

The opinion of the court was delivered by

FULLERTON, C. J.—On July 6, 1902, G. E. Marks, being then the owner of a certain tract of land situate in the city of Spokane, conveyed the same by a warranty deed, for a valuable consideration, to Ollie J. Pence; agreeing to complete a house then being constructed thereon according to plans and specifications agreed upon between the parties. The house was completed by Marks according to the agreement, but he neglected and refused to pay for certain materials used in its construction, furnished by the Washington Mill Company. The mill company filed a lien on the property for the value of the materials furnished, which they afterwards foreclosed; obtaining a judgment and decree "that plaintiff have and recover a personal judgment against the defendant, G. E. Marks, for the sum of five hundred forty-three (543) dollars, seventy-five (75) dollars attorney's fees, and eleven and 30-100 (11.30) dollars costs and disbursements herein; that plaintiff has a first, valid, and subsisting lien upon the following described real estate, situate in Spokane county, state of Washington, to wit [describing it], for said several sums; that said lien be, and is hereby, foreclosed, that

said defendants, and each of them, be, and are hereby, barred and forever estopped from having or claiming to have any right, title, interest, or lien in or to said described real estate, or any part thereof, adverse to plaintiff's said lien; that said described premises, or so much of them as shall be necessary to satisfy said several sums, shall be sold, as by law and the rules of this court provided, by the sheriff of said county; that the purchaser or purchasers at said sale be at once placed in possession of said premises by said sheriff; that execution issue for any deficiency which may remain against the property of said G. E. Marks." The mill company shortly after its entry assigned the judgment and decree to the respondent, Chas. F. Pence, who caused execution to be issued thereon as on a personal judgment, and caused the writ to be levied on a lot in the city of Spokane theretofore owned by G. E. Marks, but which he had conveyed, subsequent to the judgment, to the appellant, Ida Marks. The property last mentioned was sold by the sheriff under the writ of execution to Chas. F. Pence, and a sheriff's certificate of sale issued therefor. The appellant brought this action to cancel the certificate of sale, and to remove the judgment as a cloud upon her title. The court below denied the relief prayed for, entering a judgment of dismissal and for costs against her.

The appellant contends that the judgment creditor, who has obtained a judgment of foreclosure of a mechanic's lien, and a personal judgment against the party personally liable, in the same proceeding, cannot in the first instance issue a general execution on his personal judgment, and seize and sell thereunder the judgment debtor's property, but that he must first sell the property upon which it is adjudged he has a lien under a special execution, credit the proceeds thereof on his judgment, and issue a general

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execution for the balance, before other property than that lienied upon can be seized and sold. The statute, we think, sustains the contention. The act creating and providing for the enforcement of liens for labor and material (Laws. 1893, p. 32, *et seq.*) reads as follows:

“Sec. 12. In every case in which different liens are claimed against the same property, the court, in the judgment, must declare the rank of such lien or class of liens, which shall be in the following order: 1. All persons performing labor. 2. All persons furnishing material. 3. The subcontractors. 4. The original contractors. And the proceeds of the sale of the property must be applied to each lien or class of liens in the order of its rank; and personal judgment may be rendered in an action brought to foreclose a lien, against any party personally liable for any debt for which the lien is claimed, and if the lien be established, the judgment shall provide for the enforcement thereof upon the property liable as in case of foreclosure of mortgages; and the amount realized by such enforcement of the lien shall be credited upon the proper personal judgment, and the deficiency, if any remaining unsatisfied, shall stand as a personal judgment, and may be collected by execution against the party liable therefor. The court may allow, as part of the costs of the action, the moneys paid for filing or recording the claim, and a reasonable attorney’s fee in the superior and supreme courts.”

This section unquestionably authorizes a personal judgment against the party personally liable for the debt for which the lien is claimed whether the lien be established or not, and if the lien be not established execution could issue thereon and be levied upon any property of the judgment debtor not exempt by law from execution. A different procedure, however, seems to be intended if the lien be established. It will be noticed that the statute provides that if the lien be established the judgment shall provide for its enforcement as in case of foreclosure of mortgages, and the

deficiency remaining unsatisfied shall stand as a personal judgment, and may be collected by an execution against the party personally liable, but that a personal execution will not run in such a case in the first instance. There may have been little reason for making this distinction. But this is not a question for the courts. The right of a laborer or a material man to claim a lien upon the property of another on which he labors or for which he furnishes materials is statutory. Without a statute granting it, no such right exists. As it is purely a statutory right, the lawmaking power may put such restrictions upon the enforcement of it as it chooses, however far such restrictions may depart from the established rules of law and practice, so long as they violate no constitutional rights. In all such cases the decree must follow the statute, and the procedure to enforce it must follow the decree.

The judgment appealed from is reversed, and the cause remanded, with instructions to enter a judgment in favor of the appellant setting aside the sale of the property, and freeing it from the cloud created thereby.

MOUNT, DUNBAR and ANDERS, JJ., concur.

[No. 4510. Decided March 28, 1903.]

ED. NOLAND, *Respondent*, v. GREAT NORTHERN RAILWAY
COMPANY, *Appellant*.

RAILROADS — FIRES ALONG RIGHT OF WAY — EVIDENCE OF ORIGIN.

In an action to recover damages for fire set out by the passing engines of defendant, in which no particular engine is assigned as the direct cause of the injury, evidence that defendant's engines were in the habit of emitting sparks upon the right of way and that other fires had been caused thereby, was admissible

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as a circumstance tending to show the origin of the fire, where that was a disputed question.

SAME — PLEADING AND PROOF — VARIANCE.

In an action for damages for fire caused by defendant's engine, evidence of the inflammable condition of the right of way was inadmissible, where there was no charge of negligence in the complaint as to the improper and careless maintenance of the right of way.

SAME — INSTRUCTIONS.

Where a complaint charged defendant's negligence as consisting of carelessness in operating its locomotives and in allowing fire to spread over its right of way and upon its lands, it was error for the court to charge the jury as to the duty on the part of defendant in the matter of providing engines with the best appliances for arresting sparks, of keeping such appliances in repair, and of keeping its right of way free from combustible materials.

Appeal from Superior Court, Snohomish County.—
Hon. JOHN C. DENNEY, Judge. Reversed.

Burke, Shepard & McIlvra, for appellant.

Robert A. Hulbert, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This is an action to recover damages for destroying the plaintiff's house by fire. The pertinent parts of the complaint are as follows:

“That on or about the 23d day of August, 1901, as the trains were running upon said railroad track and passing plaintiff's said property and said tract of land, a spark of fire or sparks of fire were emitted from the locomotive propelling said train, through the utter carelessness and gross neglect of said defendant's agents and employees propelling said locomotive, and carelessly and negligently set fire upon its right of way and upon its said land, which fire so set spread over and upon said lands and premises and burned up and destroyed plaintiff's said house, together

with the furniture. . . . That said fire was caused by the neglect and carelessness of the defendant and its agents and employees in operating the locomotive belonging to the defendant and by the neglect and carelessness of the defendant and its agents and employees in allowing said fire to spread over the defendant's right of way and upon the plaintiff's property, and which burned and destroyed plaintiff's said house and property."

Judgment was rendered against the defendant for \$450, the amount asked for in the complaint, from which judgment this appeal is taken.

It is assigned first that the court erred in admitting testimony that other trains at other times set other fires, and it is insisted that the pleadings do not put in issue the sufficiency of the spark arrester with which such engine was equipped, or its condition of repair, and that it is therefore improper to admit evidence that the same train or engine threw sparks at other times. It will be noted, however, that no specific engine is designated in the complaint. If such were the case, it would not be proper to admit evidence of fires by other trains at other times for the purpose of charging the train specified with setting the fire, for the reason that it is frequently impossible, in practice to trace the fire to a particular locomotive. The appellant insists that even then the testimony is inadmissible, in the absence of an issue in the pleadings as to the condition of the spark arrester or other machinery. But we think that even in the absence of such an issue, the fact that engines of the defendant were in the habit of emitting sparks upon the right of way might be admitted as a circumstance in the case tending to show the origin of the fire, which was a disputed question in this case.

Appellant's second contention is that the court erred in admitting evidence which did not correspond with any

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allegation of the complaint, and instructing the jury upon points not presented by the issues framed by the pleadings. The witness Kendall was asked the following question: "What was the condition of its right of way along there prior to the setting of the fire?" This was objected to as immaterial. The objection was overruled, and exception taken. The answer was that it was pretty bad; that it was covered with brush, grass, and weeds that were all dry. This same question was repeated to several different witnesses, with the interposed objection that it was incompetent, irrelevant, and immaterial to the issues and pleadings in the case, and the testimony over the objection was that the right of way was covered with dry brush and rubbish. This testimony, we think, was erroneously admitted. It is elementary law that the evidence offered must correspond with the allegations in the pleadings. This rule is adopted for reasons so obvious that it is not necessary to discuss them. There is nothing in this complaint which would notify the defendant that it was called upon to defend against maintaining its right of way in an improper condition. The allegations of negligence are carelessness in operating the locomotive, and carelessness in allowing the fire to spread over the defendant's right of way and upon its property. In the absence of an allegation of negligence, no specific negligence can be presumed or proven. The instruction of the court in this regard, after setting forth the allegations of the complaint, was as follows:

"You are instructed that the negligence of the railway company whereby fire was communicated to the adjacent premises may consist, first, in not being provided with the best appliances to prevent unnecessary escape of fire from its locomotive; second, in not keeping such appliances in repair; third, in not keeping its right of way free from combustible materials; fourth, in operating its locomotive

as to unnecessarily scatter fire; fifth, in not arresting the spread of fire which has been set by its negligence or without its negligence upon its right of way. . . . The railway company is bound to exercise reasonable care and skill by the adoption of improved appliances to prevent the escape of fire or sparks; to use reasonable care and skill in operating and managing its locomotives while running; to use reasonable care in preventing the accumulation of combustible materials upon its right of way; to use reasonable care to arrest the spread of fires which have been communicated from its locomotive or which have been otherwise set upon its right of way; and use reasonable efforts to extinguish fires set by its locomotives or spreading from its right of way after such fires have reached the premises of others."

It will be observed that the court interjected into its instructions the discussion of three responsible duties on the part of the railway company, the omission of which had not been charged in the complaint, viz., the not providing their engines with the best appliances, not keeping such appliances in repair, and not keeping their right of way free from combustible materials. It is true, no doubt, as the court said, that the railway company is bound to exercise reasonable care and skill in the adoption of approved appliances and in keeping such appliances in repair, and preventing the accumulation of combustible materials upon its right of way. But it will be presumed, in the absence of an allegation to the contrary, that the company has exercised this reasonable care, and it certainly will not be called upon to establish the fact of reasonable care on its part when there is no allegation of a violation of that duty. The error in this respect is so palpable that we have not thought it necessary to discuss the many authorities cited on this subject.

The other errors alleged will probably not occur again

upon a retrial, but for the error of the court in the matter just discussed the judgment will be reversed, and a new trial ordered.

FULLERTON, C. J., and MOUNT, HADLEY and ANDERS, JJ., concur.

[No. 4558. Decided March 28, 1903.]

WEST SEATTLE LAND AND IMPROVEMENT COMPANY, *Appellant*, v. NOVELTY MILL COMPANY, *Respondent*.

TRIAL — DISCHARGE OF JURY.

Where there are no disputed facts in the evidence, but merely questions of law for the court are presented, the discharge of the jury is proper, since there is nothing for it to pass upon.

CORPORATIONS — CONVEYANCES — AUTHORITY OF OFFICERS TO EXECUTE — PRESUMPTIONS.

The authority of officers of a corporation to execute a deed will be conclusively presumed, although there was no express authorization therefor, when it appears that the board of directors had by resolution given the president general authority to dispose of the corporate lands, for which he and the secretary were empowered to execute the proper deeds in behalf of the corporation; that the president sold certain lands under contract that the purchaser should erect thereon a flouring mill of certain capacity, which was done in accordance with the contract; that the officers and stockholders knew all about the transaction at the time, but did not attempt to repudiate the authority until long after the benefits of the conveyance had been received by the corporation.

SAME — ESTOPPEL.

Where the officers of a corporation, under a general authorization to sell lands, sold and conveyed certain lands by quitclaim deed, in consideration of the expenditure of a large sum of money in improving same, and, on the discovery that the corporation had no title, a guaranty was given by the officers that title would be acquired from the state and transferred to the

purchaser, and in reliance thereon the purchaser made the improvements with the full knowledge of the officers and stockholders of the corporation, who made no attempt to repudiate the transaction until long afterwards, the corporation is estopped from asserting ownership under the after-acquired title, on the ground that the transactions of the officers were in excess of their authority.

QUITCLAIM DEED — CONVEYANCE OF AFTER-ACQUIRED TITLE.

A quitclaim deed which recites that it remises, releases and quitclaims to the grantee certain lands, "to have and to hold all and singular the said described premises, together with the appurtenances unto the said party of the second part and to his heirs and assigns forever," is sufficient to pass an after-acquired title, under Bal. Code, § 4521, which provides that a statutory quitclaim deed does not convey after-acquired title, "unless words are added expressing such intention," and under Id., § 4533a, which provides that whenever any person sells land in the state without having title at the time, and afterwards acquires a title thereto, "such title shall inure to the benefit of the purchasers."

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Affirmed.

Ira Bronson, for appellant.

Struve, Allen, Hughes & McMicken, for respondent.

The opinion of the court was delivered by

MOUNT, J.—The appellant brought this action in the lower court to eject the respondent from the possession of certain real estate upon which is situated a flouring mill and other valuable property. The complaint alleges title in appellant and right of possession, and that the respondent wrongfully withholds possession from appellant. The answer denies the allegations of the complaint, and for a first affirmative defense alleges title, possession, and right of possession in respondent; for a second affirmative defense alleges facts which respondent claims estop appellant from claiming any right or title to the land described.

Issue was joined upon the facts pleaded, and the cause came on for trial before the court and a jury. After hearing all the evidence, the court, upon motion of respondent, discharged the jury and dismissed the action. Plaintiff appeals.

There are no disputed facts in the evidence. For this reason, there was nothing for the jury to pass upon. The questions are questions of law for the court, and the jury was properly discharged. The facts are substantially as follows: The appellant is a corporation, with general powers, among which are to buy, own, sell, lease, and otherwise dispose of lands, and to lay out and plat town sites upon its lands, and improve the same in any way it may deem proper. The respondent is a milling corporation. In the year 1892 the appellant was the owner of a large tract of land fronting on Puget Sound, in what is now known as "West Seattle." The tract of land had been platted into town lots which were offered for sale. The appellant desired the original incorporators of respondent company to construct a flouring mill on this town site, and agreed to deed the land in question to respondent's grantors for a site for such mill, provided a mill with a capacity of 300 barrels of flour per day should be constructed within a period of six months. This was agreed to between appellant and respondent's grantor. The lots in question were below the line of ordinary low tide, and below the meander line as established by the United States government, but within the plat of the town site as laid out and filed for record by the appellant. The appellant executed a quitclaim deed to respondent's grantor, and placed the same in escrow with a Seattle bank to abide the construction of the mill as agreed upon. The original grantor named in the deed thereupon organized the respondent cor-

poration, which proceeded to construct the flouring mill in accordance with the agreement. Subsequently to the placing of the deed in escrow, it was discovered that the appellant did not have title to the lands in question, by reason of the fact that the same were tide lands. But the president of the appellant company, who was also the general manager thereof, entered into a written agreement with respondent to the effect that appellant company would acquire title to the property from the state of Washington as soon as the same could be done, and convey a perfect title to respondent. Thereafter respondent erected the mill as agreed, in a substantial manner, at a cost of \$50,000, within the time agreed. When the same was finished, and on or about November 12, 1892, appellant, by its general manager, accepted the same, and agreed that the mill was constructed as required; and thereupon the deed was delivered to respondent, who has ever since been in possession of the lands conducting and operating its milling business. None of the officers or stockholders of either company had any interest in the other company. Thereafter, on August 20, 1900, the appellant acquired title to the lands from the state, but refused to perfect the title in respondent. The officers of appellant company who refused to comply with the contract are not the same officers who entered into the contract with the respondent. Appellant, prior to the bringing of the action, demanded possession of the property from respondent, which demand was refused. Thereupon this action was begun.

The appellant maintains (1) that there was no authority for the agreement or for the execution of the deed by the officers of appellant to the respondent, and (2) that the deed did not convey the subsequently acquired title. There is no evidence whatever in the record to show that the

officers of the company who executed the deed and contract were not authorized to do so. There is, however, a by-law of appellant, which reads as follows:

“No deed, instrument or contract of any description purporting to be made on behalf of the company, except in relation to the ordinary routine of the business of the company shall be valid unless authorized by the board of trustees, and no instrument shall be deemed to have been duly executed on behalf of the company unless it shall be sealed with the corporate seal, signed by the president and attested by the secretary.”

There is no record expressly authorizing the officers to enter into the contract named, except the following, which appears on the minutes of the meeting of the board of trustees of appellant company of September 18, 1888, and which was construed by the officers of said company as being authority for the execution of the deed and contract:

“Office of the West Seattle Land and Improvement Co.,
Seattle, W. T., September 18, 1888.

“At a special meeting of the trustees of the West Seattle Land & Impt. Co. held at the company’s office this day, there were present the following named persons: H. G. Struve, Leigh S. J. Hunt and Thomas Ewing. Upon motion of Struve, seconded by Hunt, the following resolution was introduced and unanimously carried: ‘Resolved. That the president of the West Seattle Land and Improvement Co. be and is hereby authorized and empowered to grant, bargain, sell and dispose of any lands belonging to this company wheresoever situate, in such parcels or lots and for such price in cash or credit, and upon such terms or conditions and to such person or persons, as he may deem fit and proper, and that said president be and is hereby further authorized and directed to make, execute, acknowledge and deliver as and for the corporate act and deed of this company to purchasers of said lands, all deeds and conveyances containing such covenants as said president may deem proper, and which may be necessary to

rest the title of lands sold by virtue of this resolution in the purchaser according to the terms of sale, and that all deeds so executed by said president be attested by the corporate seal of this company, and the signature of the secretary, and that, in the absence of the president from the principal place of business of this company, the vice president of the company be and he is hereby authorized and directed to make, execute, acknowledge and deliver deeds to all lands sold by said president under this resolution in the same manner and with the same force and effect as the president is authorized to do by this resolution.' ”

This resolution is a general authority to the president to dispose of lands belonging to the appellant company, and was broad enough, and was no doubt intended, to authorize the president to execute any instrument necessary for the conduct of its business without express authorization for any particular instrument. It was supposed at that time that these lands belonged to the appellant company. They were platted into lots and blocks the same as other lands, and were offered for sale by the company. This court said in *Carrigan v. Port Crescent Improvement Co.*, 6 Wash. 590 (34 Pac. 148):

“Under these circumstances it will be presumed that it was the contract of the corporation until the contrary is made to appear. When a corporation names some person as its manager, and as such allows him in a large measure to control all its business transactions, it must be held responsible for the acts of such manager in the name of the company until it has been affirmatively shown by it that as a matter of fact such acts were unauthorized.”

This was followed in *Anderson v. Wallace Lumber & Mfg. Co.*, 30 Wash. 147 (70 Pac. 247). In Abbott's *Trial Evidence* (2d ed.), at p. 44, the rule is stated as follows:

“The seal being thus proved, upon a corporate deed regular on its face, and apparently executed in due form, the

law presumes that the deed was executed and the seal affixed by competent authority from the corporation. Hence, alike where the deed bears a due certificate of acknowledgement, etc., and where the seal is proved or judicially noticed, the law presumes that the deed was duly executed and the seal affixed by a competent authority in pursuance of whatever power the corporation has, or may be presumed to have, to convey; and it is not necessary for the party claiming under the instrument to produce the resolution or by-law giving authority, but the burden is on the party resisting it to show that the officers signing were not authorized to convey, or that those having custody of the seal were not authorized to affix it."

Under these authorities, and where it appears, as it does in this case, that there was no repudiation of the authority until long after the benefits had been received by the appellant, and where respondent had acted on the contract, and where the stockholders and officers knew all about the transaction, the authority will be conclusively presumed.

It is next urged that the deed did not convey an after-acquired title. The deed is as follows:

"West Seattle Land and Imp. Co.

to

Quitclaim Deed.

George B. Landers.

This Indenture made this 21st day of May in the year of our Lord one thousand eight hundred and ninety-two, by and between the West Seattle Land and Improvement Company, a corporation duly incorporated under the laws of the state of Washington, having its principal place of business in the city of Seattle, state of Washington, party of the first part, and George B. Landers, of the city of Seattle, King county, state of Washington, the party of the second part, Witnesseth:

"Said party of the first part for and in consideration of of the sum of one dollar and other valuable considerations to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged do by these pres-

ents remise, release and forever quitclaim unto the said party of the second part, his heirs and assigns, all those certain lots, pieces or parcels of land situate in the county of King and state of Washington, particularly described as follows, to-wit: All of lots numbered twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), twenty-one (21), twenty-two (22), twenty-three (23), twenty-four (24), and twenty-five (25), in block numbered eighty-three (83), and as shown and designated on the third plat of West Seattle as laid out and platted by the West Seattle Land and Improvement Company, which has been duly recorded in the county auditor's office of said King county in the record of plats of said county, to which said record reference is hereto made.

"Together with all and singular the tenements, hereditaments and appurtenances and particularly the littoral and riparian rights thereto belonging and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

"To have and to hold all and singular the said described premises, together with the appurtenances unto said party of the second part and to his heirs and assigns forever.

"In witness whereof the said party of the first part, on this 21st day of May, A. D. 1892, has caused these presents to be signed in its corporate name by Thomas Ewing, its president, and to be attested by M. S. Bates, its secretary, and has caused its corporate seal to be hereto affixed, all by virtue of a resolution of the board of trustees of said West Seattle Land and Improvement Company, duly passed and adopted on the 18th day of September, 1888.

(Signed) West Seattle Land and Improvement Co.

By Thomas Ewing, Its President, (Seal)
West Seattle Land and Improvement Co.

Attest: M. S. Bates, Its Secretary. (Seal)

(Duly witnessed and acknowledged.)

This deed was more than a quitclaim deed under the statute. It is true, as argued by appellant, that a statutory quitclaim deed does not convey after-acquired title unless

words are used expressing such intention. Bal. Code, § 4521. The statute, at § 4538a, Bal. Code, provides as follows:

“Whenever any person or persons having sold and conveyed by deed any lands in this state, and who, at the time of such conveyance, had no title to such land, . . . shall acquire a title to such lands so sold and conveyed, such title shall inure to the benefit of the purchasers.
.”

The deed in question purports to convey more than a release of the grantor's claim at that time. It conveys the land itself, for it recites that the party of the first part does remise, release, and forever quitclaim to the party of the second part the lands described, “to have and to hold all and singular the said described premises, together with the appurtenances unto the said party of the second part and to his heirs and assigns forever.” In *Ankeny v. Clark*, 1 Wash. 549 (20 Pac. 583), the supreme court of the territory said:

“ . . . under the statutes of our territory, a quitclaim deed is just as effectual to convey the title to real estate as any other form of deed, and a grantee in a quitclaim deed is entitled to the same presumptions as to *bona fides*, and has the same rights, as a grantee in a deed of general warranty. This is undoubtedly true of a quitclaim deed which purports on its face to convey, not merely an interest, but the real estate itself.”

See, also, *Taggart v. Risley*, 4 Ore. 235; *Garrett v. Christopher*, 74 Tex. 453 (12 S. W. 67, 15 Am. St. Rep. 850); *Balch v. Arnold*, 9 Wyo. 17 (59 Pac. 434); *Field v. Columbet*, 4 Sawy. 523 (Fed. Cas. No. 4,764); *Spies v. Neuberg*, 71 Wis. 279 (37 N. W. 417, 5 Am. St. Rep. 211). This deed conveyed upon its face a subsequently acquired title. Under the evidence in the case, the ap-

pellant, we think, is estopped from asserting any title to the property. Soon after the making of the deed, and as a part of the contract, the appellant company, through its general manager and president, made a written guaranty to the respondent before the respondent company proceeded to the erection of the mill, that it would acquire a perfect title to the said lands as soon as it could do so, and would thereafter convey the same to respondent. This agreement was for the benefit of the appellant, who sought the grantor out and importuned him to erect the mill upon the town site of appellant in order to enhance the sale and price of its town lots. Acting upon this assurance, the respondent invested a large amount of money and erected a substantial improvement, and waived its right to purchase the legal title to the lands from the state, relying upon the appellant's promise to convey good title when it could do so. This was well known by all the officers and stockholders of the appellant company, and no word of disapproval was heard until after respondent in good faith had acted on the agreement and spent large sums of money. Now, when appellant has acquired the title it seeks to rescind its agreement and to take unto itself respondent's valuable property. Such conduct would not be tolerated between individuals. It should not be tolerated between corporations.

The judgment is affirmed.

FULLERTON, C. J., and HADLEY, DUNBAR and ANDERS, JJ., concur.

[No. 4346. Decided March 30, 1903.]

THE STATE OF WASHINGTON ON THE RELATION OF WILLIAM PITT TRIMBLE v. SUPERIOR COURT OF KING COUNTY.

EMINENT DOMAIN — APPROPRIATION BY RAILWAY CORPORATION — STATE LANDS HELD UNDER CONTRACT OF SALE.

Under the power of eminent domain granted railway companies by Bal. Code, §§ 4333, 4334, which authorize them to condemn such "land, real estate, or premises" as may be necessary for right of way, such companies are empowered to appropriate the equitable interest in tide lands held by purchasers from the state under contract of sale, subject only to the right of re-entry and forfeiture on the part of the state for a failure to pay the balance of the purchase price according to the terms of the state's contract.

SAME — CONDEMNATION PROCEEDINGS — NECESSARY PARTIES.

Under Bal. Code, § 5638, which provides that notice of condemnation proceedings shall be served on each and every person named in the petition as owner, incumbrancer or otherwise interested therein, and that want of service of such notice shall render subsequent proceedings void as to the person not served, but all persons or parties served with notice shall be bound, the failure to serve all interested parties would not invalidate the proceedings against such as were included as parties and properly served with notice.

SAME — LEASE OF ROAD — EFFECT.

The fact that a railway company had leased its line of road to another corporation and does not operate its road nor possess any rolling stock of its own, would not deprive it of the power of condemning private property.

Original Application for Certiorari.

Struwe, Allen Hughes & McMicken, Preston, Carr & Gilman and George E. de Steiguer, for relator.

Burke, Shepard & McGilrra, for respondent.

The opinion of the court was delivered by

ANDERS, J.—The Seattle & Montana Railroad Company is a corporation organized under the laws of the state of Washington for the purpose of constructing, owning, and operating railroads and telegraph lines within the state. As such corporation it is vested by statute with the right to exercise the power of eminent domain. The lands and premises involved in this controversy are situated on the shore of Elliott Bay, in the harbor of Seattle, and are “tide and shore lands,” bounded on the north by King street, on the east by Oriental avenue, on the south by Connecticut street, and on the west by Occidental avenue. The record title to the easterly ten feet of the above-described tract is in William Pitt Trimble, but it seems to be conceded that that part is in fact the community property of Trimble and wife. The title to the remainder of said tract is still in the state of Washington, but possession thereof is held by the Trimbles under a contract made by the state, through its duly constituted agent, the commissioner of public lands, on March 10, 1897, agreeing to convey the same by patent to one C. E. Remsberg in consideration of the sum of \$925.34, to be paid in ten equal annual installments, the first at the time of the execution of the agreement and the others annually thereafter, with interest thereon at six per cent per annum, payable annually with each installment on all unpaid installments. This contract is in the usual form of such contracts, and provides, among other things, that the conveyance shall be “subject, however, to any lien or liens that may arise or be created in consequence of; or pursuant to, the provisions of an act of the legislature of the state of Washington entitled ‘An act prescribing the ways in which waterways for the uses of navigation may be exca-

vated by private contract, providing for liens upon tide and shore lands belonging to the state, granting rights of way across lands belonging to the state,' approved March 9, 1893"; that the vendee "will pay all taxes and assessments of every kind that may be levied or assessed on said land and premises"; that, if the said vendee "shall well and faithfully keep and perform all the covenants and agreements hereinbefore specified by him to be kept and performed in the manner and at or before the times above specified, he shall be entitled to a patent to said lands from said state of Washington as provided by law upon the surrender of said agreement and cancellation of the same"; and that "the terms of this contract shall be binding in favor of and against the said party of the second part, his heirs, executors, administrators and assigns, but no assignment of this contract shall in any way relieve the said party of the second part from the performance of the conditions hereof on his part, nor be recognized or admitted by the state of Washington, unless the same shall be endorsed hereon and executed, witnessed and acknowledged in the same manner as a conveyance of real estate is required by law to be, and said assignment shall be accepted by and entered on the records of the commissioner of public lands."

The railroad company, in pursuance of the provisions of the statute, filed a petition for condemnation in the superior court of King county, in which it substantially set forth the state's contract above mentioned, and annexed a copy thereof as an exhibit, and alleged that after the making of the said contract said Remsberg and his wife, for a valuable consideration, made and delivered to one C. F. Webb their warranty deed, which was duly recorded, conveying to her, the said Webb, all the tide lands embraced

in the said contract, and wherein and whereby said Remsberg and wife authorized the commissioner of public lands of the state of Washington, or the board of state land commissioners, or their or either of their successors in office, to make, issue, and deliver to said grantee in her name any grant, contract, or conveyance of said lands, or any part thereof, or to any person or corporation to whom said grantee might convey the same, or any part thereof; that thereafter the said C. F. Webb, for a valuable consideration, made and delivered to said William Pitt Trimble her quitclaim deed, whereby she released, remised, and quitclaimed unto him all right, title, and interest which she then had in or to said tide lands, or any part thereof, and wherein and whereby she "authorized the commissioner of public lands and the board of state land commissioners, or either of them, or their successors in office, to execute and deliver to said William Pitt Trimble any contract or conveyance of the above-described land, or any part thereof, or to any person or corporation to whom he might convey the same"; that the said Remsberg, at or soon after the time of receiving from the state its contract for the conveyance of said tide lands to him, went into possession of the same, and upon executing and delivering said warranty deed to said Webb he delivered the possession of said lands to her, and upon executing and delivering said quitclaim deed to said William Pitt Trimble she delivered the possession of said lands to him, and he has ever since remained and now is in possession thereof, claiming under said contract of the state. Counsel for the petitioners state in their brief that Remsberg and wife, as well as Trimble and wife, were joined as respondents in the condemnation proceeding, on account of the informality of these assignments, under the provisions of the contract. The petition specifically de-

scribes the lands sought to be appropriated to the use of the railroad company, as required by law, and alleges, in substance, that the use to which the land is to be devoted is a public use; that the public interest requires the prosecution of the said enterprise; and that the land, real estate, and premises sought to be appropriated are required and necessary for the purposes of such enterprise. The petition also states that the petitioner seeks to appropriate the entire fee-simple estate of the respondents Trimble in the strip of land ten feet in width which they hold by deed, and "to appropriate, condemn, and acquire the entire interest of said William Pitt Trimble and Connie Ford Trimble, his wife, in the remainder of said lots, tracts, and parcels of land, to wit, their said equitable ownership thereof, and their entire interest in said agreement with the state of Washington for the sale and conveyance thereof; and also the entire apparent interest of said C. E. Remsberg and Belle F. Remsberg, his wife, therein—all subject to the obligation imposed by the terms of said agreement upon the said C. E. Remsberg, the vendee therein named, and upon his assigns, to pay to the state of Washington the balance of the purchase price therein specified, with interest as therein required." It is further stated in the petition that the railroad company seeks to appropriate the aforesaid land and the aforesaid interests therein for the purpose of tracks and a site for terminal buildings and facilities. The petition prayed that a jury be impaneled by the court to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by the petitioner, to the respective owners, tenants, and incumbrancers of, and other persons interested in, the said lands and the said interests therein, and in said agreement for the sale and

conveyance of a part thereof, for the taking or injuriously affecting the same, or, if a jury be waived, that said compensation be ascertained by the court or a judge thereof.

It thus appears that the petition set forth all facts necessary under the statute to give the superior court jurisdiction of the subject-matter of the proceeding. Remsberg and wife and Trimble and wife were duly served with notice of the application for condemnation. The first-named parties failed to appear, but Trimble and wife appeared, and thereafter a hearing was had before one of the judges of the superior court of King county for the purpose of determining whether the alleged use for which the lands and property were sought to be appropriated was really a public use, and whether the same were required and necessary for the purposes of the petitioner, as set out in said petition. On this "preliminary hearing" the fact set out in the petition, as above noted, relative to the contract by the state for the sale of the tide lands in question, and the subsequent transfers of the vendee's interest therein, were clearly established by documentary evidence; and we think the petitioner also satisfactorily proved that the premises were required and necessary for the purposes specified, namely, a right of way for its tracks and a site for a passenger station and for platforms, warehouses, etc. But it was shown by the testimony of the petitioner's engineer that the petitioner is not the owner of any locomotives or cars, and that it does not operate its railroad, but the same is operated by the Great Northern Railway Company, under some kind of an agreement between them, the terms of which were not disclosed by the evidence. It further appeared that neither the state of Washington nor the Seattle & Lake Washington Waterway Company was made a party to or served with notice of the proceeding.

The respondents Trimble and wife objected to the proceeding on the grounds (1) that the lands and premises sought to be appropriated were not subject to condemnation under the law of this state, and (2) that there was a defect of parties, and the court had no right or authority to make any order in the premises without bringing in all parties interested in the lands in controversy. The court, however, made an order declaring that the contemplated use for which the said railroad company sought to appropriate said lands was really a public use, and that the public interest required the prosecution of the enterprise mentioned in the petition and that the lands, real estate, and premises sought to be appropriated were required and necessary for the purpose of said enterprise, and that all interested parties had been served with notice, and directing the sheriff to summon a jury to assess the damages to be paid to the owner or owners respectively, and to all tenants, incumbrancers of, and others interested in, said lands, real estate, and premises, to-wit, the said William Pitt Trimble and Connie Ford Trimble, his wife, for the taking or injuriously affecting the same by said petitioner. The said Trimble and wife, respondents in the condemnation proceeding, thereupon sued out a writ of certiorari from this court to review the action of the superior court as to the order and rulings above mentioned. And the said relators allege that "the court erred in making and entering the order of June 19, 1902, declaring the public use and necessity of the appropriation and ordering a jury to be impaneled for the assessment of the damages of Trimble and wife."

It follows from what we have already said that the objection to the findings of the court as to the public use and necessity of the appropriation is without merit, and it must be conceded that, if the particular property sought

to be appropriated is subject to be taken by virtue of the power of eminent domain, and that the owners and other persons interested therein, within the meaning of our statute, were served with notice of the hearing of the petition for condemnation, the court committed no error in ordering the summoning of a jury to determine the resulting damages. It is provided in § 4333, Bal. Code, that "a corporation organized for the construction of any railway . . . shall have the right to enter upon any land, real estate or premises . . . between the termini thereof for the purpose of examining, locating and surveying the line of such road." And § 4334 provides that "such corporation may appropriate so much of said land, real estate or premises . . . as may be necessary for the line of such road not exceeding two hundred feet in width: . . . and . . . sufficient quantity of such land, real estate or premises . . . in addition to that before specified in this section, for the necessary side tracks, depots and water stations, and the right to conduct water thereto by aqueduct." But this court has held that the interest of the state in tide lands cannot be taken under the power of eminent domain granted to railway corporations by the above-mentioned statute, for the reason that the law contemplates the taking of private and not public property, unless the right to take the latter is specifically conferred by law. *Seattle & Montana Ry. Co. v. State*, 7 Wash. 150 (34 Pac. 551, 22 L. R. A. 217, 38 Am. St. Rep. 866). And, such being the law in this state, the learned counsel for the relators contend that the tide lands in question are not subject to condemnation and appropriation by the railroad company, because they are still the property of the state, and the relators have no estate, either legal or equitable, therein; and they cite sev-

eral authorities holding, in effect, that in law the vendee in a mere executory contract for the sale of land obtains no real property or interest in real property; that the relations between the parties to the contract are wholly personal; that the vendee's right is a mere thing in action, and that it is only when the vendee performs, or offers to perform, all the acts necessary to entitle him to a deed, that he has an equitable title and may compel a conveyance. *Pomeroy, Contracts*, § 314; *Warvelle, Vendors*, p. 188, § 3. See, also, *Smith v. Jones*, 21 Utah, 270 (60 Pac. 1104—1106); *Ruggles v. Nantucket*, 11 Cush. 433; *Railway Co. v. Prescott*, 16 Wall. 603; *Railway Co. v. McShane*, 22 Wall. 444; *Northern Pacific R. R. Co. v. Traill County*, 115 U. S. 600-609 (6 Sup. Ct. 201). In the last three cases cited the real question for determination was whether lands granted to railroad companies by the United States were subject to taxation before all the conditions of the grant had been performed, and it was decided that they were not. But the authorities cited by counsel for the relators do not seem to us to be decisive of the question here under consideration. We have no doubt that, as between the parties to a contract for the sale and purchase of land, the vendee therein named does not become the full equitable owner until he performs or offers to perform all the acts necessary to entitle him to a conveyance of the land and to a specific performance of the contract in a court of equity; but it does not necessarily follow that a vendee in such a contract has no interest or estate whatever in the land covered by the agreement, which may not be controlled or divested by law. In fact, as we shall hereafter see, there are interests in real property, less than estates in fee simple, which may be taken for public uses by authority of the sovereign power. And,

it must be borne in mind that the respondent corporation is not seeking to appropriate the interest of the state in the tide lands described in the petition for condemnation, or the interest of any person or persons therein other than the state's vendee and the relators herein. It simply seeks, as we have already said, to appropriate, condemn, and acquire the entire interest of the relators in said tide lands, namely, their equitable ownership thereof, and their entire interest in said agreement with the state of Washington for the sale and conveyance thereof, and also the entire apparent interest of said Remsberg and wife therein, all subject to the obligation imposed by the terms of said agreement upon the vendee therein named, and his assigns, to pay to the state the balance of the purchase price therein specified, with interest as therein provided for. And the first question, therefore, to be determined is whether the interest sought to be appropriated by the respondent is fairly included in the grant to corporations organized for the construction of railways of the power of eminent domain. It is contended on behalf of the relators that it is not, for the alleged reason that the power to condemn and appropriate such interest is not conferred upon the respondent corporation either expressly or by necessary implication, and therefore cannot be exercised by it for the purpose of depriving the relators of property which is a mere chose in action, and not "land, real estate or premises" in contemplation of our statute. And if it be true, as claimed by their counsel, that the relators have no present interest in the lands described in the contract between their assignors and the state, it certainly follows that the condemnation proceeding must fail.

But we are clearly of the opinion that counsel are in error in assuming that the relators have, as between them-

selves and the railroad company, no interest in the lands in controversy, which is subject to be taken under the power of eminent domain. They are in possession, with the consent of the state, of all the tide lands described in the petition, and have the right to receive the rents, issues, and profits thereof, without interference on the part of the state except for a breach of the covenants set forth in the state's contract, and which we have no right to presume will be broken. Indeed, it is stated in the brief of the relators that "he [Mr. Trimble] has the right, under the contract pleaded, to make payment for this land during the period of ten years, in accordance with the terms of the agreement. He has the absolutely vested right to the possession of this land under the law, to enjoy its use, rents, issues, and profits during this period unmolested by the law of eminent domain." It is true that the relators have a vested right to the possession and use of this land, as stated by counsel, but we think it is not true that such vested right may not be molested "by the law of eminent domain." The interest of the relators is, to say the least, an interest in land, and as such may be taken for a public use by condemnation, upon payment of just compensation therefor. It is an interest that may be sold for taxes (*State v. Frost*, 25 Wash. 134, 64 Pac. 902), and which may be assigned, transferred, and disposed of by the relators; and the state cannot deprive them of this right. *Washington Iron Works Co. v. King County*, 20 Wash. 150 (54 Pac. 1004).

"The term 'land,' in statutes conferring power to condemn, is taken in its legal sense, and includes both the soil and buildings and other structures on it, and any and all interests therein. An easement may be taken under authority to take land." 1 Lewis, Eminent Domain (2d ed.) § 285.

In *People ex rel. Heyneman v. Blake*, 19 Cal. 579, the court held (FIELD, C. J., delivering the opinion) that the right to condemn private lands under the water company act of 1858, in accordance with the railroad act of 1853, included the right to condemn any estate or interest in the land necessary for the purposes of the company, and that the company might, therefore, seek in its petition for condemnation only the right of excavating a tunnel through the land, and of running pipes through the tunnel to convey its water, without seeking to obtain a title to the land. In *In re Metropolitan El. Ry. Co.*, 2 N. Y. Supp. 278, which was a condemnation proceeding, the property sought to be acquired by the railway company was described generally as "so much of the privilege, easement, or other interest in said street as is taken, appropriated, or interfered with by the construction and maintenance of the elevated railroad of the petitioner belonging to or claimed by . . . , and appurtenant to the lots and premises known as . . . , and bounded and described as follows." And the supreme court of New York there ruled that the term "real estate," as used in the statutes granting the right of condemnation to the petitioner, "covers all the incorporeal hereditaments, easements, rights, and privileges which it is sought to acquire in these various proceedings." In *Story v. New York El. R. R. Co.*, 90 N. Y. 122 (43 Am. Rep. 146), it was decided, in effect, that the right of access to an improved lot abutting on a street and the right to have light and air pass to a building thereon were property, and subject to condemnation. See, also, *Lahr v. Metropolitan El. Ry. Co.*, 104 N. Y. 268 (10 N. E. 528); *State ex rel. Smith v. Superior Court*, 30 Wash. 219 (70 Pac. 484); *State ex rel. Smith v. Superior Court*, 26 Wash. 278 (66 Pac. 385).

This court held, in *Seattle & M. Ry. Co. v. Scheike*, 3 Wash. 625 (29 Pac. 217), that the lessee of land condemned by a railroad company is entitled to the damages resulting to his leasehold estate. And in *Enoch v. Spokane Falls & N. Ry. Co.*, 6 Wash. 393 (33 Pac. 966), we held that, where a railroad company appropriates public lands of the United States upon which a pre-emption entry has been properly made prior to the filing of a profile of the road in the office of the secretary of the interior, the railroad company is liable for damages, although the pre-emption claimant is not at the time entitled to a patent from the government. The decisions of this court above cited are based upon the conception that the interest of the respective parties therein mentioned is included in the terms "land" and "real estate," for on no other theory could such interest be condemned at all.

In *Fish v. Fowlie*, 58 Cal. 373, the supreme court of California, having under consideration the interest of the vendee under an executory contract of sale of land, said: "The words 'real property' are co-extensive with lands, tenements, and hereditaments. 'Land' also embraces all titles, legal or equitable, perfect or imperfect, including such rights as lie in contract—those which are executory as well as those which are executed. Any interest, therefore, in land, legal or equitable, is subject to attachment or execution, levy and sale."

And this court has held that under § 5200, Bal. Code, which provides that "all property, real and personal, of the judgment debtor, not exempt by law, shall be liable to execution," equitable as well as legal estates may be sold on execution. *Calhoun v. Leary*, 6 Wash. 17 (32 Pac. 1070).

It was held by the supreme court of Wisconsin in *Martin*

v. Scofield, 41 Wis. 167, that a vendee in an ordinary land contract, with right of possession, is to be regarded as the equitable owner, and as such owner may maintain an action of trover or replevin for timber taken from the land without his consent. In that case it appeared that the owner of the lot from which the logs in controversy were taken executed to the plaintiff in the year 1871 a contract to convey to him, upon his paying to her \$200, with interest thereon, in one year, in addition to \$57.04 paid at the time the contract was executed. At the time of the trial the \$200 had not been paid, but the interest had been paid up to February 1, 1875. The contract provided, among other things, for re-entry in case the vendee should make default in his payments, for a right of distress upon the premises for arrears of interest, and for the recovery of damages for waste. In regard to the relation between the parties to the contract, and the effect of the contract upon the ownership of the land, the court said:

"It has often been held that the relation between the parties to a contract for the conveyance of land is analogous to that of equitable mortgagor and mortgagee in fee of the land affected by the contract. And such is the relation the plaintiff and Mrs. Whitney [the vendor named in the contract] sustain to each other in respect to the land in question. . . . We have no difficulty, therefore, in holding that, when the logs were cut by Coppersmith, the equitable estate in the land upon which they were cut, and the possession and right to the possession of the land, were in the plaintiff. It follows, on the authority of *Northrup v. Trask*, 39 Wis. 515, that the plaintiff was the owner of land, and, of course, of any timber cut upon it, subject only to the right of Mrs. Whitney as mortgagee, and that he alone could maintain trover or replevin for timber and logs taken therefrom without his consent."

The doctrine announced in the case last cited as to the relation between the parties to a valid contract for the sale of land is so firmly settled against the contention of the relators "by a train of uncontroverted authority" that it is now beyond the realm of legitimate controversy. This doctrine of "equitable conversion" has been applied in a great variety of cases, and under divers circumstances. It was recognized and applied, without hesitation, by the supreme court of Pennsylvania in an action of ejectment (which was, of course, an action at law) in the case of *Kerr v. Day*, 14 Pa. St. 112 (53 Am. Dec. 526). In that case the trial court instructed the jury as follows:

"(2) That an agreement to give a party an option of purchasing certain land is a mere personal covenant or agreement, and not such an agreement as vests any interest, legal or equitable, in the land the subject of the contract; and that the defendant, claiming under such agreement alone, without any act of election previous to the sale to the plaintiff, has no such title to the land as furnishes the foundation of a defense to an action of ejectment."

The defendant held the land there in question under an optional contract of sale, and the plaintiff claimed it as owner by virtue of a conveyance made to him by defendant's vendor, the holder of the legal title. Upon that state of facts the appellate court held that the instruction above set forth was erroneous. And the ground upon which the court rested its decision is clearly and tersely stated in the opinion delivered by BELL, J., in the following language:

"The ground upon which a chancellor executes an executory contract for the sale of lands is that equity looks upon things agreed to be done as actually performed; consequently, when an agreement is made for the sale of an estate, the vendor is considered as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase money for the vendor. The vendee is,

in contemplation of equity, actually seised of the estate, and is, therefore, subject to any loss that may happen to it between the agreement and the conveyance, and will enjoy any benefit which may accrue in the same interval. As a consequence, he may sell or charge the estate before conveyance executed; and the death of either vendor or vendee, even before the time of completing the contract, is held to be entirely immaterial. As a result of this principle, which seems to be of general application, it is settled that an estate under contract of sale is regarded as converted into personalty from the time of the contract, notwithstanding an election to complete the purchase rests entirely with the purchaser; and, if the seller die before the election be exercised, the purchase money, when paid, will go to his executors as assets."

In the case of *Lysaght v. Edwards*, L. R. 2 Chan. Div. 499, JESSEL, M. R., speaking of the effect of a contract for the sale of lands, said:

"A valid contract actually changes the ownership in equity. . . . It must, therefore, be considered to be established that the vendor is a constructive trustee of the purchaser of the estate from the moment the contract is entered into. . . . The fact of the purchaser's being able to pay or not being able to pay is immaterial. tract is made, if valid."

See, also, *King v. Ruckman*, 21 N. J. Eq. 599; *Keep v. Miller*, 42 N. J. Eq. 100 (6 Atl. 495); 1 Sugden on Vendors (8th Am. ed. by Perkins), p. 270 *et seq.*; *Craig v. Leslie*, 3 Wheat. 563; *Haughwout v. Murphy*, 22 N. J. Eq. 531, 546. In the New Jersey case last above cited, the court observed:

"In equity, upon an agreement for the sale of lands, the contract is regarded, for most purposes, as if specifically executed. The purchaser becomes the equitable owner of the lands, and the vendor of the purchase money. After the contract, the vendor is the trustee of the legal

estate for the vendee. . . . Before the contract is executed by conveyance, the lands are devisable by the vendee, and descendible to his heirs as real estate; and the personal representatives of the vendor are entitled to the purchase money."

And Warvelle, in his work on Vendors, vol. 1, p. 197-8, lays down the rule as follows:

"Where the purchaser has been let into possession, he is, in equity, the owner, subject only to the lien of the vendor for the unpaid purchase money. . He has a right to the free use and enjoyment of the property, and to the rents, issues, and profits thereof, so long as he is not in default under the contract. He may mortgage it for the payment of his debts; may sell and assign his rights to another; or may create a privilege or easement upon any part of the premises which will be valid and binding, but liable to be defeated should there be a failure to pay the balance of the purchase money according to the terms and conditions of the contract of purchase."

The doctrine of equitable conversion has also been frequently invoked in determining upon whom should fall the loss, and who should be entitled to the insurance, if any, in case of destruction by fire of buildings situated upon land under an executory contract of sale. See *Reed v. Lukens*, 44 Pa. St. 200 (84 Am. Dec. 425); *Marks v. Tichenor*, 85 Ky. 536 (4 S. W. 225); *Brewer v. Herbert*, 30 Md. 301 (96 Am. Dec. 582); *Taylor v. Holmes*, 14 Fed. 498. In the well-considered case of *St. Louis, etc., R. R. Co. v. Wilder*, 17 Kan. 239, it was held that a vendee under a bond for a deed is regarded as the real owner of the land, even before full payment of the purchase price is made, and that he, and not the vendor, is entitled to receive the damages if part of the land is taken in a proceeding for condemnation. See, also, *Kuhn v. Freeman*, 15 Kan. 423; *Pinkerton v. Boston & A. R. R. Co.*, 109 Mass. 527;

2 Lewis, Eminent Domain (2d ed.) § 319. And in a recent publication it is said that:

“The vendee under an executory contract of sale is the equitable owner, entitled to a deed upon performance of his contract. If, therefore, pending that performance, a part of the land is taken by sovereign authority, he still remains liable to the vendor for the entire purchase money, is entitled to the entire damages, is a necessary party to the condemnation proceeding, and may maintain the proceeding in his own name.” 7 Enc. Pl. & Pr. 507.

It seems clear to us, in view of the authorities, that the relators must be regarded as the real owners of the lots in question, subject only to the right of re-entry and forfeiture on the part of the state in the event of a failure on their part, or that of their successors or assigns, to pay the balance of the purchase price according to the terms of the state's contract. Indeed, this court said in *Washington Iron Works Co. v. King County*, *supra*, where the question under consideration was whether tide lands under a contract of sale like the one now before us, were subject to taxation before the contract was fully executed by the vendee, that: “In equity, appellants are the owners, possessing a real and substantial interest, which they can assign, transfer, and dispose of as they choose; and the state cannot deprive them of this right. . . . The naked legal title is in the state, but for one purpose only—to secure the unpaid purchase price.”

It is true that this case was distinguished in the subsequent case of *State v. Frost*, *supra*, where it was very properly held that only the interest of the vendee in a contract of sale of state lands can be charged with taxes, and that the state's right to the purchase price, or its right to forfeit the contract for nonpayment thereof, cannot be divested by a tax sale of such lands. But the doctrine an-

nounced in the former case as to the equitable ownership of the vendee of tide lands under an executory contract of sale was neither repudiated nor questioned.

It is provided in § 5637, Bal. Code, that any corporation authorized by law to appropriate land, real estate, premises, or other property for corporate purposes may present to the superior court a petition describing the property sought to be appropriated and "setting forth the name of each and every owner, encumbrancer, or other person or party interested in the same, or any part thereof, so far as the same can be ascertained from the public records, the object for which the land is sought to be appropriated, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money," etc. And § 5638 provides that a notice stating briefly the objects of the petition shall be served on each and every person named therein as owner, incumbrancer, tenant, or others interested therein, at least ten days previous to the time designated in the notice for the presentation of the petition. But the same section further provides that want of service of such notice shall render the subsequent proceedings void as to the person not served, but all persons or parties having been served with notice as in this section provided shall be bound by the subsequent proceedings. Section 5640 provides, in effect, among other things, that if the court or judge thereof shall have satisfactory proof that all parties interested in the land, real estate, or premises described in the petition have been duly served with the prescribed notice, the court or judge thereof may make an order directing the sheriff to summon a jury to determine the compensation to be paid to the respective parties entitled thereto. As we have seen, the state of Washington was not served with notice of the hearing of the petition,

and it is therefore insisted by the relators here (as they insisted in the superior court) that the court, under the provisions of said § 5638, requiring each and every person named in the petition to be served with such notice, had no right to make the order now under consideration. But we are of the opinion that the provision requiring notice to be served on all interested parties is not jurisdictional, except as to persons or parties not served. The statute expressly declares that all persons duly served with notice shall be bound by the "subsequent proceedings," but that want of service shall render such proceedings void "as to the person not served." *Owen v. St. Paul, etc., Ry. Co.*, 12 Wash. 313 (41 Pac. 44). And it seems to be the general rule that: "The omission of any proper party will not invalidate the proceeding as against such persons as are made parties. The only consequence is that as against the omitted persons the condemnation will be nugatory." 7 Enc. Pl. & Pr. 504. See, also, *Matter of Boston, etc., Ry. Co.*, 79 N. Y. 69, wherein it was held that, where the lessee alone is made a party, the estate in reversion will not be affected. While it is true that the state holds the naked legal title to these tide lands as trustee for the relators and their assigns, and is, to that extent, interested therein, it is also true that it is no more concerned in the condemnation suit than it would be in a voluntary transfer by the relators of their interest to the respondent herein. The state cannot be involuntarily deprived of its title by condemnation or otherwise, and the fact that it was not made a party to the proceeding cannot affect its rights or those of the relators in any manner or degree whatever. All that the relators are entitled to is just compensation for their interest in the land, and such compensation can readily be determined without regard to the rights of the state or any other person or party.

What we have already said concerning the omission to make the state a party virtually disposes of the objection that the Seattle & Lake Washington Waterway Company is a necessary party to the condemnation proceeding, and should have been served with notice of the hearing of the petition. It must be remembered that the respondent is not seeking to condemn any interest that that company may have in the premises in question, and we are unable to see how the failure to serve it with notice of the preliminary hearing can affect its interest, if it has any, in the land sought to be appropriated by the respondent. The railroad company has elected to carry on its condemnation suit without making the waterway company a party, and it will, therefore, be responsible to the latter company for whatever damages it may suffer in consequence thereof. And the relators will neither gain nor lose anything by reason of the fact that the waterway company was not notified of the hearing in the superior court, and did not appear in that proceeding.

It is also objected that the respondent, the Seattle & Montana Railroad Company, has no right to condemn this property for the purposes indicated in its petition, because it appears from the evidence that it has no rolling stock of its own, does not operate its road, and does and will permit the Great Northern Railway Company and other railroad companies to run their passenger and freight trains over its line into Seattle, and to use its depot and terminal grounds there situated. In other words, it seems to be claimed that the proof shows that the respondent company is seeking, through the exercise of the power of eminent domain, to take the property of these relators not for its own use and benefit, but for the use and benefit of other corporations. We think this objection is wholly untenable.

Under what agreement or understanding between the two companies the respondent's railroad is used and operated by the Great Northern Railway Company, or upon what terms and conditions the cars of other railroad companies are or may be transported over its road, is not disclosed by the evidence; but, whatever the arrangement is under which this may be done, it cannot be presumed to be illegal. Indeed, it is not only the right, but the duty, of the Seattle & Montana Railroad Company, under the law and the constitution of this state, to permit such use of its road by other railroad companies. Bal. Code, § 4318; Const. art. 12, § 13. And, if it be true that said company has leased its railroad to the Great Northern Company, or any other company or companies, or agreed to do so, it is not thereby precluded from condemning and appropriating private property for a public use, which may be necessary for its tracks, side tracks, depots, etc. *In re Metropolitan E. Ry. Co.*, *supra*; *Croll v. Minneapolis, etc., Ry. Co.*, 30 Minn. 541 (16 N. W. 422); *Mayor v. Norwich & W. R. R. Co.*, 109 Mass. 103; *In re New York, etc., Ry. Co.*, 99 N. Y. 12 (1 N. E. 27); *Chicago, etc., R. R. Co. v. Illinois Central R. R. Co.*, 113 Ill. 156. In *In re Metropolitan El. Ry. Co.*, 2 N. Y. Supp. 278, *supra*, it was objected that the condemnation proceedings could not be maintained by the petitioner because of the lease of its line of road to another company. Concerning the objection, the court said:

"This objection is not well founded, because it has been repeatedly decided that the leasing of the line of a railway corporation to another corporation does not deprive the former of the power to exercise the right of eminent domain."

The Illinois case above cited (113 Ill. 156) is an

interesting and instructive one, and is directly in point here, especially on the question of the power of a lessor railroad company to condemn private property for corporate purposes. In that case, as in this, the company seeking to appropriate the property did not own any cars or locomotives, and did not transport passengers or freight, and had leased its line to other companies, and yet the court there held that it was not thereby deprived of the right to take property under the power of eminent domain.

We see no prejudicial error in the proceeding in the superior court, and the order under review is affirmed.

FULLERTON, C. J., and HADLEY, DUNBAR, and MOUNT, JJ., concur.

[No. 4482. Decided March 30, 1903.]

ALBERT W. GOLDTHORPE, *Respondent*, v. CLARK-NICKERSON LUMBER COMPANY, *Appellant*.

MASTER AND SERVANT — NEGLIGENCE OF MASTER — ACTION BY SERVANT FOR INJURIES — QUESTION FOR JURY.

In an action to recover damages for injuries occasioned by defendant's negligence, a question for the jury is presented, where there was testimony to the effect that defendant had been taken away from his employment in another part of defendant's plant and directed by a vice principal to go upon a platform where the light was defective and remove a belt from the shaft for the purposes of repair; that in attempting to lift the belt he was caught and drawn around the shaft; that the belt was old, frayed and had laces, threads and fragments hanging from it; that the shaft was somewhat rough from rust and that these threads would have a tendency to catch and be drawn around it; and that plaintiff was caught by the buckling of the belt, thereby receiving the injuries complained of; there being conflicting testimony as to whether the belt had been properly handled by him for the purpose of removal.

31	467
38	314
38	533
31	467
42	467

SAME — ASSUMPTION OF RISK.

A workman is not barred from recovery under the doctrine of assumption of risk, although aware of the defective nature of an appliance in use, where the danger therefrom is not plainly discernible and he is ordered by a vice principal to proceed with the dangerous work, the workmen having a right to assume that he is not going to be exposed to unnecessary perils.

SAME — INSTRUCTIONS — EXPRESSION OF OPINION AS TO AMOUNT OF DAMAGES.

Where the prayer of the complaint in an action for damages was for judgment in the sum of \$25,500, it was not the expression of an opinion on the part of the court to charge the jury that, if their verdict should be for plaintiff, they should find his damage to be in an amount not exceeding the sum of \$25,500.

TRIAL — INSTRUCTIONS — CONSTRUCTION AS A WHOLE.

The instructions of the court must be considered as a whole, and error cannot be predicated upon the incompleteness of one of the instructions, when the alleged omission is amply and clearly covered elsewhere in the charge.

SAME — HARMLESS ERROR.

In an action to recover for injuries caused a servant by a defective belt, failure to instruct as to the nonliability of the master in case the defect was such a one as he could not discover by reasonable care and caution was not prejudicial error, where the evidence was undisputed and conclusive that the belt was defective, had been condemned by the master, and afterwards ordered into use again.

Appeal from Superior Court, Snohomish County.—
Hon. JOHN C. DENNEY, Judge. Affirmed.

Preston, Carr & Gilman and *Robert A. Hulbert*, for appellant.

Holmes & Husted and *Brownell & Coleman*, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—Briefly stated, the respondent was employed by the appellant lumber company, which was oper-

ating a saw mill in the city of Everett, and was directed by a millwright in the employ of the mill company to assist in putting a belt upon a shaft running through the mill, to be attached to an emory wheel situate in the mill, for the purpose of turning said wheel. The respondent's employment required him to work in a machine and blacksmith shop, which was situated in a small building connected with the mill plant proper, and contained a lathe and minor machinist's tools, blacksmith forge and blacksmith tools, and a small steam engine which furnished the power to operate the lathe and other appliances. His general duties consisted of running the engine in this machine shop and operating the lathe and other machinist's tools. He was instructed by the superintendent, when he was employed, to take his orders from the millwrights. The belt which it was desired to place upon the line shaft was an old rubber belt about two inches in width, which had been used for the purpose of operating the emory wheel. The respondent was directed by the millwright Hatchell to go up on a platform back of the shaft and hold the belt off the shaft while Hatchell laced the ends together. In pursuance of this order he went upon the platform and took hold of the belt with his right hand to lift it from the shaft. Just as he lifted it from the shaft the belt in some way caught, and the respondent was drawn by it around the shaft and seriously injured. His right arm was pulled off, or so nearly so that it was amputated by the assistance of a pair of scissors; his leg was broken in three different places; and he received other injuries more or less severe. In an action for damages he recovered judgment for \$10,000. From said judgment this appeal is taken.

Upon the close of respondent's testimony, motion was made to take the case from the jury and render judgment

for the defendant, which was denied. At the close of all the testimony the motion was renewed, and again denied. It is charged that the court erred in denying appellant's challenge to the sufficiency of the evidence, and motion to take the case from the jury and bring a judgment for the defendant, made at the close of the testimony; erred in denying appellant's motion to instruct the jury to render a verdict for the defendant, and in giving certain instructions. The contention of the respondent is that the injury was caused by a defect in the belt, which it was claimed had laces, threads, and fragments hanging from it that were caught by the revolving shaft, causing the damage; while the appellant contends that there is no evidence tending to sustain this theory, but that it reasonably appears from the testimony that the accident must have occurred from one of two causes—the catching of the clothes of the respondent upon the shaft, or the doubling of the belt caused by the careless manner in which respondent took hold of it to hold it from the shaft. There is no use entering into a discussion of the relative responsibilities and duties of masters and servants, which have been so often discussed by this court. It may be conceded at the outset that it is the duty of the master to furnish the servant with a reasonably safe place in which to work, and safe appliances; that it is the duty of the servant to exercise prudence and care in the performance of his duties; and that the implied duty of each is measured by the standard of ordinary care. It is true that, the action being based upon negligence, negligence must be proven. But negligence is proven, like any other fact, by all the circumstances in the case reasonably and intelligently bearing upon the question of negligence. We think there was sufficient testimony, if undisputed, to warrant the jury in conclud-

ing that the accident was caused by defects in the belt. The belt is before this court as an exhibit in the case. It is in rather a frayed and dilapidated condition, showing considerable use and wear, it being more or less torn, with fragments hanging from it, and being mended with copper rivets on each side of a tear in the belt, which renders it anything but smooth. In addition to this, the testimony of plaintiff's witnesses is to the effect that strings and laces were hanging from the belt, and that, if the shaft was rough or rusty, the rapid revolutions of the shaft—in this instance 250 to the minute—would have a tendency to suck or draw the strings or lacings around the shaft and cause it to stick or adhere to the shaft. One of appellant's witnesses testified to the effect that such a result would be possible; and the testimony was that the shaft was more or less rough and rusty. The respondent, who testified in the case, swears positively that the accident was not caused by the shaft catching his sleeve, or by the unskillful handling of the belt. On this subject, of how the belt should be handled, there was a direct conflict in the testimony. So far as the condition of the belt is concerned, it is admitted that it was a condemned belt. Attention had been called to it by the respondent several days before, and it had been taken off and a new belt ordered, but on this particular day it was brought back again by the millwright in charge. It is contended by the appellant that the testimony shows that the respondent knew the condition of this belt, was informed of it at the time, and that he assumed the risks of its imperfect condition; that, in addition to this, he had the right and the authority to stop the machinery while the belt was being placed—that being an absolutely safe way—and that, having seen fit to adopt an unsafe way when a safe way was available, he was guilty of negligence,

and that his employer was not responsible for any damages which might result. Great reliance is placed upon the case of *Hoffman v. American Foundry Co.*, 18 Wash. 287 (51 Pac. 385), and it is insisted that that case is conclusive of the case at bar. But we think these cases are distinguishable. In that case it appeared that a shaft supported by brackets was run by a belt running over the outside of a pulley; that on the shaft inside the brackets were collars fastened by set screws, the heads of the latter projecting five-eighths of an inch; that there was no defect in pulley or belt, and that collars and screws of like character were in general use on similar machinery; that the belt slipped from the pulley while in rapid motion, and that plaintiff, without stopping the machinery, in attempting to replace the belt which caught upon the projecting screw was injured. It was held that the employer was not chargeable with negligence on account of the construction of the appliance used because it was an appliance which was in ordinary use, and that the plaintiff was negligent in attempting to adjust the belt while the machinery was in motion, on the theory, above indicated, that there was a safe way to perform the work, and that he chose the unsafe way. But in that case, as near as we can ascertain from the opinion and the briefs, the operator was in charge of the machinery, and it was held that it was his duty to know of the condition of the screw, he having been operating that machinery for some time. Here the respondent was not in charge. His business was in another department. He had been instructed by the superintendent to take his orders from the millwrights. This was testified to not only by the respondent but by the superintendent of the company. In addition, he testifies, and it is testified to by other witnesses, that it was so dark on the plat-

form where he was sent to work that he could not plainly see the condition of the belt or of anything else. This contention is answered by the appellant by citing the case of *French v. First Avenue Ry. Co.*, 24 Wash. 83 (63 Pac. 1108), where it was held that, notwithstanding the place where French was working was not sufficiently lighted, he could not recover because it was his duty to see that it was sufficiently lighted. But in that case, again, French was in control. He had been employed to take charge of the engine room, had visited it a time or two before his employment commenced, for the purpose of making an inspection, and was absolutely in control of the machinery and the apartment in which the machinery was located. It was held that, if there were any defects in the machinery or the apartment, it was his duty to correct them, and therefore he could not recover of the employer. *Anderson v. Inland Telephone & Telegraph Co.*, 19 Wash. 575 (53 Pac. 657, 41 L. R. A. 410), is also relied upon by the appellant. There a lineman in the employ of the telephone company was held to be guilty of contributory negligence in coming in contact with a guy wire supporting a trolley wire, which had become highly charged with electricity owing to the breaking of an insulator. But in that instance it was found that it was the lineman's duty to inspect the insulator; that there were no other inspectors for that purpose; that he was equipped with apparatus for testing these electric insulators; and that for these reasons he could not recover on account of dangerous or defective machinery or appliances. In this case it is conceded, not only by the testimony of the respondent, but by that of the superintendent of the appellant company, that the respondent was in an inferior position, and that it was his duty to take his orders from the millwrights, who were act-

ing in the capacity of vice principals of the company. Even though he had known or believed that the belt was not as safe as it ought to be, the judgment of the servant must be held subservient to that of the master, except in cases where the danger is plainly discernible. In the case of *Green v. Western American Co.*, 30 Wash. 87 (70 Pac. 310), the following extract from *Mining Company v. Schmidt*, 43 C. C. A. 532, 104 Fed. 282, was approvingly quoted:

“Whatever may be the exemption of the employer from liability for injuries caused by a danger that is obvious to the injured, such exemption will not be accorded where the nature of the menace is so uncertain as to cause discussion between the employees and the employer, with the result that the employer dissuades the employee of his apprehension.”

Gundlach v. Schott, 192 Ill. 509 (61 N. E. 332, 85 Am. St. Rep. 348), was also cited, where it was said:

“It is well settled that even though the plaintiff knew of the defect, if the master ordered him to proceed with the dangerous work he did not assume the risk of so doing unless the danger was so manifest that a person of ordinary prudence and caution would not have incurred it. Even if the servant has some knowledge of attendant danger, his right of recovery will not be defeated, if, in obeying the order, he acts with the degree of prudence which an ordinarily prudent man would exercise under the circumstances. When the master orders the servant to perform his work the latter has a right to assume that the former, with his superior knowledge of the facts, would not expose him to unnecessary perils. The servant has a right to rest upon the assurance that there is no danger, which is implied by such an order. The master and servant are not altogether upon a footing of equality. The primary duty of the latter is obedience, and he cannot be charged with negligence in obeying an order of the master unless he acts

recklessly in so obeying. Whether he acted thus recklessly in obeying his master's order, or whether he acted as a reasonably prudent person should act, are questions of fact to be determined by the jury.' *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447;"

citing *Offut v. World's Columbian Exposition*, 175 Ill. 472 (51 N. E. 651); *Myrberg v. Baltimore, etc., Reduction Co.*, 25 Wash. 364 (65 Pac. 539).

The application of this sentiment may also be made to the contention that it was the duty of the respondent to have stopped the machinery before undertaking to place the belt. In addition to this, as we have before said, the respondent in this case was not the directing mind, and the further fact that this was a line shaft, and that it could not be stopped without stopping the machinery of the mill generally, would have had a tendency to deter the servant from stopping such machinery, especially when he was acting under the direct orders of the master. The other cases cited by the appellant from this court we do not think are at all in point, and, applying the rule which we have uniformly announced, that this court will not interfere with the verdict of a jury unless it appears that no two reasonable minds could differ in reaching a conclusion as to the cause of the injury, we do not feel like disturbing the judgment in this respect.

The contention that the court erred in instructing the jury that, if their verdict should be for the plaintiff, they should find his damage to be in an amount not exceeding the sum of \$25,500, is not tenable. Such instruction was in no sense an expression on the part of the court of an opinion that the plaintiff's injuries were of such a character that the amount of his damages could be limited only by the prayer of the complaint. It was a simple statement as to the limitation of recovery under the complaint, and

an instruction that is not only proper, but necessary, to be given to the jury in all cases of this kind.

The other instructions objected to are as follows:

“In this case if you find that the plaintiff was injured by the reason of a latent danger in the belt of which he had no knowledge and of which he could not have known by the exercise of reasonable care and caution, in the place to which he was sent, then you are instructed that if you further find that the accident occurred by reason of such concealed or hidden danger, that your verdict must be for the plaintiff.”

The alleged objection to this instruction is that no reference is made to the nonliability of the master in case the defect was such a one as he could not discover by reasonable care and caution, and if this had been all the instruction on that subject, the instruction might be considered objectionable. But we have often said, in common with all other courts, that the instructions must be considered as a whole, and that error cannot be based upon segregated instructions. On this point it will be found that the instructions are ample and clear. For instance, on page 186 of the statement of facts, the court instructed the jury as follows:

“In this case it was the duty of the master to furnish a belt which was reasonably safe for the use to which it was put, and if you find from the evidence in this case that the belt by which the accident occurred was a defective belt, and that the master had knowledge of that defect through the knowledge of the millwrights, or of its superintendent Broadbent, and knew that the belt was not a safe or proper belt, then you are instructed the master failed to discharge his duty toward the plaintiff.”

So that the duty of the master, so far as knowledge of defect is concerned, is plainly set out by the court in this and other instructions. In addition to this, if the court

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had erred, it would be error without prejudice, for the evidence is conclusive and undisputed that there was a defect in the belt, that the belt had been condemned by the master, and that after such condemnation it had again been ordered into use.

Finding no error in the instructions, and the questions of fact having been submitted to the jury and found against the appellant, the judgment will be affirmed.

FULLERTON, C. J., and MOUNT and HADLEY, JJ.,
concur.

[No. 4501. Decided March 30, 1903.]

NATIONAL BANK OF COMMERCE, *Respondent*, v. CARY W.
COOK, *Appellant*.

APPEAL — INSUFFICIENCY OF EVIDENCE.

The findings of the trial court will not be disturbed in a case triable *de novo* on appeal, when the testimony is conflicting, without preponderating strongly in favor of the defendant, since weight should be given to the judgment of the court who saw and heard the witnesses testify.

Appeal from Superior Court, Pierce County.—Hon.
THAD HUSTON, Judge. Affirmed.

Hudson & Holt, J. M. Ashton and W. L. Sachse, for
appellant.

F. S. Blattner and Harvey L. Johnson, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—Appellant and one John B. Hardy entered into a contract by the terms of which Hardy agreed to furnish and install in the steamboat "Mainlander," its boilers,

engines, and appliances, at an agreed price. The contract contained a guaranty by Hardy to the following effect:

“The party of the second part hereby stipulates and guarantees that all of the machinery, boilers, material and equipment so furnished shall be of first class material and workmanship in every respect, and be capable of propelling the said steamboat or vessel at a speed of fourteen statute miles per hour on a consumption of not more than two pounds of Franklin coal per indicated horse power per hour, and further covenants and guarantees that the machinery shall be capable of propelling the vessel when loaded to a draught of eleven feet at a speed of fourteen statute miles per hour on a consumption of 1,300 pounds Franklin coal per hour. This guarantee to extend for a period of six months from the date of the completion, and the vessel during said period is to be used only on regular runs between Tacoma, Washington, and Vancouver, British Columbia.”

The contract is a long one, and many mutual guaranties are incorporated in it, but the main controversy is over the guaranty just above quoted. The boilers to be furnished under the contract were two gunboat boilers, the price of the same being \$12,350. After the execution of the contract the terms were changed, to the effect that Seabury water tube boilers were substituted; the latter boilers costing \$10,000 apiece. The steamer was completed and turned over to the possession of the party of the first part (the appellant here); the amount of the contract price having been paid, with the exception of \$5,172.80, which amount was assigned by Hardy to the plaintiff, respondent here. The written assignment was made with the knowledge and acceptance of the appellant, and upon the refusal to pay the same this action was brought.

The court, among other findings, made the following:

“That the said John B. Hardy fully performed all the conditions of the aforesaid written contract on his part to be performed, and there is due and unpaid from the defendant under said contract the sum of \$5,172.80, with interest thereon from April 15, 1901.”

Judgment was entered for that amount, and a lien established upon the ship. Outside of the many questions which are discussed by counsel in their briefs in relation to the construction of the contract, we think the testimony supports the finding of the court in the particular above quoted, which goes to the merits of the case. On every material issue the testimony was conflicting. It seems from the testimony that, so far as the principal trips of the ship are concerned, if all the coal that was used should be charged up to such trips, more tons of coal were consumed than was provided for in the guaranty. But there is undisputed testimony that a great deal of coal was consumed while the ship was lying idle under banked fires. The testimony is conflicting as to the amount thus consumed, ranging from two to six or seven tons per day. If this amount be deducted from the amount consumed during the actual working hours of the steamer, the consumption would probably be within the guaranty. In addition to this, it appears that there were operated an electric light plant, sanitary pumping plant, and a steam heating plant, all of which consumed coal which, it is testified, would in the aggregate amount to twenty-five per cent. of the whole amount of coal consumed. It is the contention of the respondent that the amount of coal consumed by these different plants was not included in the warranty; while the appellant contends that a reasonable construction of the contract would include it. Upon this subject, again, the testimony is conflicting, as it is on the question of defects in the machinery which was made and supplied by Hardy.

It is also in evidence by disinterested witnesses that, after the completion of the boat and after the six months' time for trial had expired, the appellant recommended Hardy to other parties as a skillful and honest contractor, stating that he had done work for him (referring to the work in controversy) and that it was well and satisfactorily done. Hardy also testifies that the appellant told him about the middle of March that everything was satisfactory; that he asked appellant if there was anything that he wanted him to do to the boat so that she would be accepted on the 15th of April, in order that he get his money then without any question, and appellant said that he did not know of anything, and asked Hardy if he knew of anything. The reply was that he knew of nothing excepting a small bracket on the reversing gear, which he was then repairing. It appears, also, that an accident had happened to the boat at Vancouver, knocking off one of the blades of the propeller; that she was then beached, and the opposite blade was then knocked off, and the boat was run for some time with two blades instead of four, which, it is testified, would require more coal. Of course, much of this testimony was contradicted by the appellant. But the possession of the boat was delivered to the appellant, and, while it is true that there was a mutual agreement as to who should be the engineer to run the boat during the six-months period of probation, the possession was actually in the appellant; and it does not appear that any objection was made during the six months, but it was only after that time, and a short time before this action was commenced, that claims of delinquency were made. While, as we have before indicated, the testimony is conflicting, and while the case is tried here *de novo*, some weight will be given to the judgment of the trial court, who saw the witnesses on the

stand and heard them testify; and, in consideration of the whole record, we are of the opinion that the findings of the court were justified.

The assignment was sufficient to warrant the judgment, and it will therefore be affirmed.

FULLERTON, C. J., and MOUNT, HADLEY and ANDERS, JJ., concur.

[No. 4631. Decided March 30, 1903.]

THE STATE OF WASHINGTON *on the Relation of* Chas. P. Oudin v. SUPERIOR COURT OF SPOKANE COUNTY, HENRY L. KENNAN, *Judge*.

PROHIBITION, WHEN LIES — INADEQUATE REMEDY BY APPEAL.

The writ of prohibition will issue against the superior court in favor of a defendant on whose motion a receiver was discharged, from which order appeal was taken by plaintiff and the control of the receiver superseded during appeal, since there is no remedy by appeal for the defendant, the only appealable order, if any, being the one in his favor for the discharge of the receiver.

RECEIVERS — DISCHARGE — APPEAL — EFFECT OF SUPERSEDEAS.

Where the discharge of a receiver follows as a matter of course upon the affirmance of the final judgment in a cause which makes no provision for the retention of the receiver, an order for the discharge is self-executing, and the filing of a supersedeas bond on a second appeal would not reinstate the receiver, or authorize the court to maintain possession of the property pending appeal.

Original Application for Prohibition.

Thayer & Belt, for relator.

Danson & Huneke and *R. L. Edmiston*, for respondent.

The opinion of the court was delivered by

MOUNT, J.—Application for a writ of prohibition. In the year 1900 M. L. Bergman and others began an action in the superior court of Spokane county, in equity, against C. P. Oudin and others, and subsequently a receiver was appointed to take charge of and operate a pottery plant about which the litigation arose. After a trial of that action a decree was rendered in favor of the defendants. The plaintiffs appealed from that judgment to this court. Pending the appeal the receiver retained possession of the property. The judgment was subsequently affirmed by this court. *Bergman v. Oudin*, 30 Wash. 703 (70 Pac. 1135). On the remittitur from this court being filed in the lower court, the defendants moved for a discharge of the receiver. This motion was granted, and on March 3, 1903, the lower court made and entered an order discharging the receiver, as follows:

“Now on this 3d day of March, 1903, the above-entitled cause came regularly on for hearing on application of the defendants for an order discharging the receiver herein, George E. Cole; and the parties herein appearing in court by their attorneys, and evidence having been offered and considered, and the court being fully advised in the premises, it is hereby ordered and adjudged as follows: (1) That said receiver, George E. Cole, be, and he is hereby, discharged as receiver in this case, and directed to forthwith turn over and deliver to the Oudin & Bergman Fire Clay Mining & Manufacturing Company all its real and personal property, except the sum of \$150 in money, which may be retained until the settlement of the receiver's account; the books and papers of the company to be delivered by him to the company's secretary, Martin L. Bergman, and the moneys of the company to be paid over to the company's treasurer, Charles P. Oudin, after first paying the amount hereinafter mentioned. (2) That said receiver forthwith pay into the office of the clerk of this

court, for the benefit of Charles P. Oudin and Eva M. Oudin, the sum of \$1,447.51, in satisfaction of the judgment in their favor against said company. (3) That he forthwith make a tender to either Thomas F. Conlan or M. L. Bergman of the sum of \$865, mentioned in the decree herein."

The money was paid as directed; the plaintiffs Conlan and Bergman accepting the money tendered to them according to the order, and the order was fully complied with by the receiver, as directed by the court, except that before he had turned over the pottery plant, books, etc., an appeal was taken by the plaintiffs from the order discharging the receiver, and the court, upon motion of the appellant, fixed the supersedeas bond on appeal, which was given; and thereupon the lower court assumed to exercise jurisdiction over the pottery plant, and to maintain the receiver in possession thereof, and now threatens to punish the defendants for contempt of court if they, or any of them, attempt to interfere in any way with the possession of the receiver. No defense is offered to this application, except that the order discharging the receiver has been superseded, and also that the relator has a remedy by appeal. It is not suggested by counsel for respondents, in his brief or in his oral argument, what the relator could appeal from. He certainly cannot appeal from the order of discharge of the receiver, for that order was made upon his motion, and is in his favor. It is not even contended that relator could appeal from the order fixing a supersedeas bond. If relator cannot appeal from one of these orders, then it is difficult to understand wherein he has an adequate remedy by appeal.

The remaining question is, does the giving of the stay bond on appeal reinstate the possession of the property in the hands of the receiver? It is argued by relator that the

order of final discharge is not an appealable order. We do not desire at this time to decide this question, because it is not necessary in this case, and, further, because that question will more properly arise in the case here on appeal. The final decree in *Bergman v. Oudin* did not provide for the retention of the receiver thereafter. For that reason the order discharging the receiver followed as a matter of course upon the affirmance of the judgment of the lower court in *Bergman v. Oudin, supra*. The order was self-executing, and immediately terminated the right of the receiver to withhold possession of the property from the parties entitled thereto under the decree as affirmed by this court, and therefore falls squarely within the principle announced in *Fawcett v. Superior Court*, 15 Wash. 342 (46 Pac. 389, 55 Am. St. Rep. 894). The supersedeas bond therefore did not reinstate the receiver, or authorize the court to maintain possession of the property.

It was stated by counsel for respondent on the oral argument that there was no contention over the accounts of the receiver, and that these accounts had all been settled. There is nothing, therefore, for the receiver to do. The cause in which he was appointed has been finally determined. All the issues which were or could have been litigated between the parties were litigated, and are at an end. The receivership should also end.

We think, under the showing made, the court is exercising and threatening to exercise authority without his jurisdiction, and the writ is therefore granted as prayed. Costs in favor of relator.

DUNBAR, HADLEY, and ANDERS, JJ., concur.

[No. 4238. Decided April 1, 1903.]

JAMES E. MCGREW, *Respondent*, v. ARCHIBALD LAMB *et ux.*, *Appellants*.

FORCIBLE ENTRY AND DETAINER — COMMENCEMENT OF ACTION — WHAT STATUTE GOVERNS.

The provisions of Bal. Code, § 5532, requiring the filing of a complaint in actions of forcible entry and detainer prior to the issuance and service of the summons has been superseded by the subsequent enactment of the general law governing the commencement of actions and service of summons, as provided in Bal. Code, § 4869 *et seq.* (*Security Savings & T. Co. v. Hackett*, 27 Wash. 247, followed).

SAME — PLEADING — SUFFICIENCY OF COMPLAINT.

In an action of forcible entry and detainer, a complaint alleging entrance without right, by means of breaking open windows and doors, without permission of the owner and without color of title merely tenders an issue of right of possession, where it fails to embody in the complaint an abstract of plaintiff's title, as required by Bal. Code, § 5550, and therefore fails to state a cause of action involving title.

SAME — RIGHT OF POSSESSION.

An allegation in a complaint that plaintiff is the owner of the fee simple is insufficient to show possession thereof, so as to warrant recovery in the summary action of forcible entry and detainer.

SAME — PLEADING AND PROOF.

In an action to recover possession of land, an allegation in the complaint that plaintiff holds as owner is not supported by the admission of deeds showing a conveyance of the land to plaintiff's grantor, and from the latter to plaintiff, when the deed to plaintiff's grantor, though absolute on its face, was merely a mortgage to secure an advancement of money.

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Reversed.

L. H. Wheeler and *N. S. Peterson*, for appellants.

The opinion of the court was delivered by

HADLEY, J.—This is an action for the possession of certain real estate which respondent seeks to recover from appellants. The complaint alleges that respondent is the owner of the property and that appellants, without his permission and without any color of title thereto, unlawfully and without right entered upon the premises by force and stealth, and obtained entrance to the dwelling house thereon by breaking open the windows and doors thereof. It is also averred that respondent served upon appellants a three days' notice to vacate the premises. Upon their failure to comply with the notice, this suit was brought to recover possession and damages for the unlawful detention of the premises. The answer is a general denial. A trial was had before a jury, resulting in a verdict that respondent is entitled to the possession of the property. Judgment was entered upon the verdict, directing the issuance of a writ of restitution and awarding costs to respondent. From said judgment this appeal was taken.

It is assigned that the court erred in denying appellants' motion to quash the service of summons. Under special appearance appellants moved to quash the service upon the ground that no complaint was filed in the office of the clerk prior to the issuance and service of the summons, as appears to be contemplated by the forcible entry and detainer law as found in § 5532, Bal. Code. Since the passage of that statute the general method of commencing actions and of serving summons has been changed and the precise question presented here was decided adversely to appellants' contention in *Security Savings & Trust Co. v. Hackett*, 27 Wash. 247 (67 Pac. 607).

It is next urged that the court erred in admitting any evidence under the complaint. Appellants objected to

the introduction of any evidence on the ground that the complaint fails to state a cause of action under any of the provisions of the statute authorizing the summary procedure of forcible entry and detainer. The averments of the complaint seem to combine the conditions enumerated in subdivision 1 of § 5525 with those named in § 5549, Bal. Code. It alleges that the entrance was without right, unlawful, and by means of breaking open windows and doors. The method of entrance alleged is covered by § 5525, *supra*, and other allegations, in their legal effect, show that the appellants were not, prior to the time alleged, in possession of the premises. Further allegations that the entrance was without permission of the owner and without color of title are in accord with § 5549, *supra*. But there is a failure to embody in the complaint an abstract of respondent's title as required by § 5550 of the same chapter. Respondent not having made a statement of his abstract of title, the appellants were not required to answer affirmatively on the subject of title, and the complaint did not, therefore, tender the issue contemplated by §§ 5549 to 5551, inclusive, Bal. Code. The only issue that can be said to be tendered by the complaint is the naked one of possession in the respondent. No question of title is involved.

"It is well settled that title is not involved in either a criminal prosecution for, or a civil action of, forcible entry and detainer, and that, therefore, as a general rule, evidence thereof is inadmissible." 13 Am. & Eng. Enc. Law (2d ed.), p. 753.

For respondent to recover it must appear that he was in actual possession of the property when appellants forcibly entered. The only fact alleged that tends to show that respondent was then in possession is that he was the owner

of the fee simple of the property. But such an allegation, even though proven, is held to be alone insufficient to show possession. *Sanchez v. Loureyro*, 46 Cal. 641; *Townsend v. Van Aspen*, 38 Ala. 572; *McGuire v. Cook*, 13 Ark. 448. One may be the fee simple owner and yet he may neither be in actual possession nor have any immediate right to possession. We think it was error to admit evidence under the allegations of the complaint. Respondent could not recover unless he was in possession, and he did not allege facts which showed him to be in actual possession. At most, they showed no more than right of possession. But actual possession is necessary for his recovery under other allegations of the complaint.

Assuming, however, that the court properly ruled that evidence showing possession could be introduced under the complaint, we find that two deeds were admitted in evidence over objection, one running to the respondent's grantor and the other from the latter to respondent. It was stated that they were not offered for the purpose of showing title in respondent, but only as tending to show possession in him. But whatever weight might properly have been given to the deeds for that purpose, still upon the trial respondent and his counsel admitted that the deed to respondent's grantor was made as security for an advancement of money. It was therefore no more than a mortgage, and respondent holds by no greater right than did his grantor, the mortgagee. It may have been the theory of the court that, even though respondent admittedly held only the rights of a mortgagee, it might be shown that he held as a mortgagee in possession. But the allegation of the complaint is that he held as owner only; and, even if that allegation showed possession, it is not supported by the proof, which is inconsistent therewith. The

evidence shows that appellants claim to hold as tenants of the party who made the deed to respondent's grantor, which deed, under the admission in the record, was only a mortgage. Appellants challenged the legal sufficiency of the evidence at the close of the testimony and moved the court to decide as a matter of law that a verdict should be found for the appellants, that the jury be discharged, and judgment entered for appellants. We think, even if it were held that the court did not err in admitting testimony at the beginning, that this motion should have been granted.

Respondent seems to have permitted this case to go by default in this court, and has filed no brief. As we understand the record, the cause should be reversed for reasons stated above. The judgment is reversed and the cause remanded, with instructions to the trial court to grant the challenge to the evidence and enter judgment for appellants.

FULLERTON, C. J., and MOUNT, ANDERS and DUNBAR, JJ., concur.

[No. 4626. Decided April 1, 1903.]

ISAAC A. DOSSETT, *Respondent*, v. ST. PAUL AND TACOMA LUMBER COMPANY, *Appellant*.

APPEAL — DEFECTIVE BOND — NECESSITY FOR SUBSTITUTION OF NEW BOND.

The use of the term "plaintiff" instead of "defendant" in an appeal bond reciting as a condition that if defendant will pay to plaintiff all costs and damages that may be awarded against said "plaintiff" on the appeal or the dismissal thereof, the appeal having been taken by defendant, is so manifestly a clerical error

as not to affect the substance of the bond nor create a necessity for the substitution of a new bond in correction thereof.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM O. CHAPMAN, Judge. Motion to substitute appeal bond denied.

Reynolds & Griggs and Stiles & Doolittle, for appellant.

Ellis & Fletcher, for respondent.

PER CURIAM.—Appellant moves this court for leave to correct its appeal bond filed with the clerk of the superior court by the substitution of a new bond with the same sureties and in the same words as the original bond, with the exception that the word “defendant” is used in the condition of the new bond proposed instead of the word “plaintiff,” as used in the original. The original bond is in words and figures as follows:

“Know all men by these presents, that the St. Paul & Tacoma Lumber Company, a corporation, the defendant in the above entitled action, as principal, and Geo. Browne and Jno. S. Baker, as sureties, are held and firmly bound unto Isaac A. Dossett, the plaintiff in the above entitled action, in the penal sum of two hundred (\$200) dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators and successors, firmly, jointly and severally by these presents.

Scaled with our seals and dated this 9th day of December, 1902.

The condition of this obligation is such that whereas a certain judgment was entered in the above entitled action by the above named court on Nov. 22, 1902; and

Whereas, said defendant, the St. Paul & Tacoma Lumber Company, a corporation, has appealed from the said judgment to the supreme court of the State of Washington;

Now, therefore, if the said defendant, the St. Paul & Tacoma Lumber Company, a corporation, will pay to the said plaintiff, Isaac A. Dossett, all costs and damages that may be awarded against said plaintiff on said appeal or on the dismissal thereof, not exceeding \$200, then this obligation shall be null and void; otherwise to remain in full force and effect."

The bond is signed in proper form by both principal and sureties, and the sureties have duly qualified by the usual affidavit. It will be observed that the words used are in all respects regular and the meaning of the bond is clear and beyond dispute, unless the last paragraph thereof is involved so as to render its meaning doubtful. The essential words urged as being involved are as follows: "Now, therefore, if the said defendant . . . will pay to the said plaintiff . . . all costs and damages that may be awarded against said plaintiff on said appeal or on the dismissal thereof. . . ." The context shows clearly that the word "plaintiff" as last used was intended to refer to the defendant. No costs would be awarded against the plaintiff in the event of the dismissal of the appeal, since he has not appealed. The costs would necessarily be awarded against the defendant who is the appellant. The body of the bond shows that the defendant and the sureties undertook to pay the plaintiff the sum of \$200, for the reason that the defendant has appealed to this court, and it is manifest that the undertaking is for the benefit of the plaintiff and to secure him in the payment of costs to which he may become entitled on the appeal or on its dismissal. Any other construction would lead to the somewhat absurd conclusion that the defendant has undertaken to pay the plaintiff the very costs which the defendant itself may recover against him on appeal. The misuse of the one word is so manifestly

a mere clerical error that it does not go to the substance of the bond and is not a substantial variation of its proper form. Under the liberal provision of § 5492, Bal. Code, applying to bonds in general, we see no necessity for the substitution of the proposed new bond, and the motion is therefore denied.

[No. 4202. Decided April 2, 1903.]

THE STATE OF WASHINGTON *on the Relation of J. W. Smith, Appellant, v. BOARD OF DENTAL EXAMINERS OF THE STATE OF WASHINGTON, Respondent.*

DENTISTS — EXAMINATION AND REGISTRATION.

The proviso to § 1, of the act of 1901, amending the dentistry law of 1893, which excepts from the operation of the statutory requirements as to examination and registration of dentists, "persons engaged in the practice of dentistry at the time of the passage of this act who are *bona fide* citizens of the state of Washington," contemplates only those who were lawfully practicing at that date, and would not operate in favor of those who had been practicing as dentists in violation of the existing law at the time of the passage of the amendatory law.

SAME — CONSTITUTIONAL LAW.

Laws for the regulation of the practice of dentistry fall within the police power of the state, and hence are not unconstitutional on the ground of infringing the rights of the individual.

SAME — STATUTES — TITLE OF ACT.

An act providing a penalty for practicing dentistry without a license is not unconstitutional because of the failure of the title to specify that the act provides for a penalty, since the title of the act, "An act to regulate the practice of dentistry in the state of Washington," is comprehensive enough to include the means necessary to effect the object sought by the statute.

Appeal from Superior Court, King County.—HON. ARTHUR E. GRIFFIN, Judge. Affirmed.

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Apr. 1903.] Opinion of the Court.—HADLEY, J.

Ballinger, Ronald & Battle and E. H. Guie (Thomas M. Vance and J. W. Robinson, of counsel), for appellant.

Piles, Donworth & Howe, for respondents.

The opinion of the court was delivered by

HADLEY, J.—The relator applied to the superior court for a writ of mandate directed to the board of dental examiners of the state of Washington, and to respondents as members constituting said board. At the hearing the following stipulation was filed as embodying the essential facts involved:

“It is hereby stipulated and agreed that J. W. Smith, the applicant herein, for five years last past, but no longer, has been, and at the time of the passage by the legislature at its regular session of an act to amend sections 4, 6, 8 and 11 of chapter 55 of the session laws of 1893, approved by the Governor March 18, 1901, was, for a fee, treating diseases or lesions of the human teeth and jaws and correcting malpositions thereof, but that said Smith is not a graduate of a dental college, nor is he a holder of any diploma of any dental college, nor has he ever attended a course of lectures of any dental college, nor has he ever held any such diploma; that he has never passed any examination for admission to practice dentistry in the state of Washington or elsewhere; that he has never been licensed as a dentist, or been registered as such under the provisions of an act of the legislature of the state of Washington, entitled ‘An act to regulate the practice of dentistry in the state of Washington, and declaring an emergency,’ approved March 8, 1893, or under any other act.”

Upon the above facts the court denied the writ of mandate, entered judgment that relator shall take nothing, and awarded costs to respondents. The relator has appealed.

The sole question involved in this case is whether ap-

pellant is entitled to be registered as a dental practitioner in the state of Washington. Chapter 55, p. 88 *et seq.*, Session Laws 1893, contains an act regulating the practice of dentistry in this state. Section 4 of that act provides that any person who desires to begin the practice of dentistry after the passage of the act shall file his name and application for examination with the secretary of the board of dental examiners, pay the required fee, and present himself before the board for examination at the next regular meeting of that body. It is further provided that no person shall be eligible for such examination unless he shall be of good moral character, and shall present to the board his diploma from some dental college in good standing, with satisfactory evidence of his rightful possession of the same. But, by a special proviso of the section, persons may be admitted to examination who shall give satisfactory evidence of having been engaged in the practice of dentistry ten years prior to the date of application for examination. Section 8 of the act provides a penalty, by way of fine or imprisonment, for the violation of the terms of the statute. The stipulation above set out shows that appellant has never had a diploma from a dental college, and had practiced dentistry for five years, and no more, before his application for registration was made. It is manifest that by so practicing dentistry he was violating the terms of the law of 1893, since he never passed an examination entitling him to be registered, and was not qualified to be even admitted to examination, either by reason of holding a diploma from a dental college, or of having practiced the required time. The law of 1893 was amended in 1901. The amending act is found in chapter 152, p. 314, Session Laws 1901. Section 1 of the amending act is an amendment to the above

mentioned § 4 of the act of 1893. The essential features of the former section are repeated in the amending section, with the exception that the proviso in the former section which admits to examination those who have practiced dentistry for ten years is omitted, and the following proviso appears in the amended section: "Provided, this section shall not apply to persons engaged in the practice of dentistry at the time of the passage of this act who are *bona fide* citizens of the state of Washington." After the above statute went into effect appellant applied to the board of dental examiners to be registered and licensed as a practicing dentist, and claimed his right thereto under the quoted proviso above. He claims that, as a citizen of the state, engaged in the practice of dentistry at the time of the passage of the act, he is exempt from all the requirements as to examination and is at once entitled to registration. Appellant had been engaged five years in what he calls the practice of dentistry, but under his interpretation of the law one who had been engaged therein but five days is entitled to the same privilege, and that too without regard to any dental college or other training. Can it be possible that the legislature intended such an unreasonable and seemingly absurd result? For years the policy of the state prior to the passage of this act had been to require all persons engaging in the practice of dentistry to pass an examination before the dental board of examiners, and for one to even be admitted to such examination he must have been either a dental college graduate, or a practitioner for ten years. Yet appellant's contention here would permit one who happened to be a *bona fide* citizen of the state when the act of 1901 was passed to practice dentistry, although he may have been without learning, experience, or skill in the profes-

sion. It is true, if such were clearly the legislative intent, it would have to be so held, however unwise such a regulation might be deemed to be. Let us endeavor to discover the legislative meaning. When the act of 1901 was passed, all persons who were *lawfully* engaged in the practice of dentistry in the state had already passed an examination before the board, and there was no necessity for the examination requirements of the new law being applied to them. Hence the proviso exempting them. But the appellant goes further and says the exemption must apply to all others then citizens of the state who were engaged in the practice of dentistry. Were there in fact any others actually engaged in the practice of dentistry, as that term must be understood in this statute? The act of 1901 was not an original act upon the subject of dentistry. It was an amending act and must therefore be construed in the light of previous legislation upon the subject. The first legislation was in territorial days, and the last, before the 1901 amendment, was by the state in 1893. What was it to practice dentistry under the law of 1893? It was to pursue a lawful vocation in the manner prescribed by statute. The daily commission of a misdemeanor for five continuing years by violating the law of 1893, as appellant admittedly did, was not practicing dentistry, although he may have performed some acts which dentists perform, and called it practicing dentistry. The amending section must be held to refer to the practice of dentistry as it was then recognized by law. Appellant contends that, in order to give the statute the effect we have stated above, the word "lawfully" must be read into it. We do not intend to read into the statute anything that is not already there. But it is our duty to ascertain as fully as possible the spirit of the law from the words used, and we

think we should presume in this connection that, when the legislature used the words "persons engaged in the practice of dentistry," it did not intend to include in that class persons who had never complied with existing law entitling them to engage in such vocation, and who had furthermore openly and continuously violated that law. The persons exempted from the examination were those who had complied with the law, for they were the only ones actually practicing dentistry, as that term must be construed in the light of lawful regulations. Appellant was not included in that class, was not exempt from examination, and was not entitled to be registered as he demanded. That such regulations are within constitutional limitations has already been held by this court. *State v. Carey*, 4 Wash. 424 (30 Pac. 729). That decision related to the practice of medicine and surgery, but the principle is the same. In view of that decision, it seems unnecessary to further discuss that phase of this case, and, indeed, we do not understand appellant to seriously urge that objection. The wisdom of such regulations, pertaining not only to dentistry, but also to the practice of medicine and surgery, is apparent. It is of the highest importance to the state that suffering and afflicted humanity shall not be subjected to the care and treatment of unlearned and unskilled persons. In its effort to prevent such a misfortune to its people, the state may adopt a standard for the test of fitness to engage in the work of what should be a learned profession. When that standard is adopted, those who assume to do the work of such a profession must prove their fitness by the test of such standard. Otherwise they violate the law and cannot be recognized by the state as practitioners of a lawful profession when they seek to follow it in an unlawful way.

Appellant further urges that the section of the act of 1893 which provides a penalty for practicing dentistry without a license is unconstitutional, for the reason that the title does not specifically state that the act provides for a penalty. The title is as follows: "An act to regulate the practice of dentistry in the State of Washington, and declaring an emergency." It will be observed that the title is as comprehensive as it well could be. It is very clear from it that the act treats of the general subject of regulating the practice of dentistry. Such regulation is universally understood to be founded in the police power of the state, and such power and regulation, it is well known, can be enforced only by some penal provision. Such a provision is included in the general subject of regulation expressed in the title, and is germane to its purpose. It is true, the act shall contain but one subject, and that shall be expressed in its title. While the act shall contain but one subject, yet there are many phases of that subject that may properly be treated in the same act, just as a work upon the subject of damages may treat upon many phases of the general subject. It is impracticable to indicate in the title of either a book or a legislative act every phase of the general subject that may be treated. The subject of an act being to regulate the practice of a given profession, the legislature may include in the act the means related to the subject for effecting the object sought. The title is sufficient, under the following authorities: Cooley, *Constitutional Limitations* (6th ed.), pp. 174, 175; *Plumb v. Christie*, 103 Ga. 686 (30 S. E. 759, 42 L. R. A. 181); *State v. Bennett*, 102 Mo. 356 (14 S. W. 865, 10 L. R. A. 717); *Cohn v. People*, 149 Ill. 486 (37 N. E. 60, 23 L. R. A. 821, 41 Am. St. Rep. 304); *State v. Gerhardt*, 145 Ind. 439 (44 N. E.

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Syllabus.

469, 33 L. R. A. 313); *State v. Yardley*, 95 Tenn. 546 (32 S. W. 481, 34 L. R. A. 656); *Hartford Fire Ins. Co. v. Raymond*, 70 Mich. 485 (38 N. W. 474); *Johnson v. Martin*, 75 Tex. 33 (12 S. W. 321).

We think the lower court did not err in denying the writ asked, and the judgment is affirmed.

FULLETON, C. J., and MOUNT, ANDERS and DUNBAR, J.J., concur.

[No. 4466. Decided April 3, 1903.]

STANDARD FURNITURE COMPANY, *Respondent*, v. CON
VAN ALSTINE *et al.*, *Appellants*.

SALES — VOID CONTRACT — RIGHT OF POSSESSION — ATTACHMENT.

The fact that a contract for the sale of goods for an immoral purpose was unenforcible would not entitle an attaching creditor of the vendee to hold them as against the vendor, to whom the vendee had surrendered all right and title in the goods.

SAME — JUDGMENT FOR WRONGFUL REPLEVIN — SATISFACTION.

A judgment awarding the return of goods or the recovery of their value on account of a wrongful replevin must be deemed satisfied and therefore unenforcible where it appears that the judgment is in favor of an attaching creditor who took the goods under an illegal writ of attachment which was reversed on appeal, and that the attachment debtor had subsequently surrendered all right in the replevied goods to the party who had sued out the writ of replevin.

SAME — ESTOPPEL TO ASSERT COMMUNITY INTEREST.

Where a husband procures an attachment sale of goods as the separate property of his wife, he is estopped from setting up a community interest therein as against one subsequently acquiring title through the wife.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Affirmed.

Ballinger, Ronald & Battle and *Richard Winsor*, for appellants.

Richard Osborn and *Preston, Carr & Gilman*, for respondent.

The opinion of the court was delivered by

MOUNT, J.—Action in equity to restrain the collection of a judgment at law. Plaintiff had judgment below. Defendants appeal.

The judgment appealed from restrained the levy of an execution issued upon a judgment of nonsuit in an action for replevin, wherein a judgment was rendered against respondent and in favor of the appellant Van Alstine, for the return of certain goods or their value, \$800. The facts are not disputed and are substantially as follows: On May 14, 1898, Lou Mehaffey and Emma Norton were conducting a house of prostitution in the city of Seattle. On that date they purchased a bill of household goods from the Standard Furniture Company, respondent here, under a conditional bill of sale. The vendees were to pay a certain sum in cash, and monthly payments thereafter until the goods were paid for, the title of the goods to remain in the vendor until the purchase price was fully paid. At this time Lou Mehaffey was married to a man by the name of Con Van Alstine, but maintained the name of Lou Mehaffey. Her marital relations were not known to the respondent. After the goods were sold, Lou Mehaffey (Van Alstine) brought an action for divorce against her husband. He appeared in the action, and filed a cross-complaint for divorce against his wife, and prayed judgment therein against her and Emma Norton and others for a large amount of money, which he claimed was fraudulently ob-

tained from his possession. Upon the trial of that cause the court rendered judgment against Lou Mehaffey Van Alstine and Emma Norton for the sum of \$30,965. An appeal was taken from that judgment. Pending the appeal in this court Con Van Alstine issued an execution on his judgment, and, without notice or knowledge to the Standard Furniture Company, levied upon and sold the goods above referred to in possession of Lou Mehaffey Van Alstine and Emma Norton at sheriff's sale, and became the purchaser himself. Thereupon, and while the case of *Van Alstine v. Van Alstine* was pending on appeal in this court, the Standard Furniture Company brought an action in replevin against Con Van Alstine for the goods, giving a bond under the statute, and taking possession thereof pending the trial of the cause. Upon the trial of this last-named cause, it appearing to the trial court that the plaintiff, the Standard Furniture Company, had sold the goods in question to be used for an immoral purpose, the court, upon its own motion, dismissed the case, and entered judgment in favor of the defendant Van Alstine for the return of the goods, or their value, \$800. This case was also appealed to this court and the judgment affirmed, July 25, 1900. *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670 (62 Pac. 145, 51 L. R. A. 889, 79 Am. St. Rep. 960). Subsequently, and on November 24, 1900, this court reversed the divorce case of *Van Alstine v. Van Alstine*, and ordered the action dismissed for want of jurisdiction in the lower court. *Van Alstine v. Van Alstine*, 23 Wash. 310 (63 Pac. 243). The Standard Furniture Company still retained possession of the goods in question, and, prior to the bringing of this action, had a settlement with Lou Mehaffey and Emma Norton, who surrendered to respondent all claim to the goods. There-

after, and prior to the bringing of this action, Mr. Van Alstine issued an execution on the judgment in the replevin case, and was threatening to collect the sum of \$800 from the plaintiff, when the plaintiff brought this action, setting up the facts above stated, and, further, that plaintiff was not a party to the suit of *Van Alstine v. Van Alstine*, and at the time of the trial in the replevin case of *Standard Furniture Co. v. Van Alstine* had no opportunity to plead the invalidity of the judgment in the case of *Van Alstine v. Van Alstine et al.*; that the said judgment was null, and gave the defendant in the replevin case no title or right to the goods or the judgment for \$800.

It is conceded that the appellant Van Alstine was and had been a non-resident of this state for a year prior to the time of the trial, and has no property within the jurisdiction of this court; and also that the respondent has "no other or adequate remedy at law or otherwise, for its protection against the threatened acts of the defendants, nor to secure the relief prayed for, except by this action." The appellants here rely largely upon the fact that the immoral nature of the contract by which respondent sold the goods to Lou Mehaffey and Emma Norton deprives respondent of a remedy to relieve itself from the judgment for \$800 in the action for replevin, viz., *Standard Furniture Co. v. Van Alstine*. Many authorities are cited to the effect that, where a contract is void as against public policy, it will not be enforced. But these cases are not in point in this action. Respondent is not seeking to enforce that contract. Whether it was a legal or an illegal contract can make no difference here. Respondent is relying upon another contract, which is not against public policy. It is not denied that, after respondent obtained possession

of the goods, a settlement was had between the persons entitled to possession thereof and respondent, by which settlement all the right and interest of Lou Mehaffey and Emma Norton in and to the property was transferred to respondent. If appellant Van Alstine wrongfully obtained the possession of the property from Lou Mehaffey and Emma Norton, the question as to how they came into possession of it, or the purposes for which they purchased it, can make no difference in this case. That transaction is closed. The fact that the contract by which they acquired the property was illegal or void would not justify any person in wrongfully taking the property away from them or in retaining such possession. *McDonald v. Lund*, 13 Wash. 412 (43 Pac. 348).

It is further claimed by appellant Van Alstine that he has a right to the property from the fact that he was the husband of Lou Mehaffey. It admitted, however, that the only other right of appellant to the property is by virtue of the levy and sale under a judgment which was afterwards reversed by this court. The statute, at § 6526, Bal. Code, provides:

“If by a decision of the supreme court the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of the judgment or order appealed from, either the supreme court or the court below may direct an execution or writ of restitution to issue for the purpose of restoring to the appellant his property, or the value thereof. . . . ”

Laying aside for the present the fact that one of the judgment debtors in *Van Alstine v. Van Alstine* was the wife of appellant, it follows from the statute quoted that upon the reversal of the judgment under which the property was sold the judgment creditor who sold and purchased the property at his own sale was bound to return

the property, or the value thereof, to the judgment debtors, and a writ of restitution might have issued therefor, against which no defense could have been interposed. It so happened, however, that when the reversal of the judgment took place, the property which had been wrongfully sold and bought in by the judgment creditor had been wrongfully taken from him under a writ of replevin by the respondent. The judgment debtors, who were Lou Mehaffey and Emma Norton, in the case of *Van Alstine v. Van Alstine*, therefore might have proceeded against Con Van Alstine, appellant here, by execution for the value of the property, or by writ of restitution for the property itself; and, where the property was wrongfully in the hands of respondent, as stated, the owners, from whom the possession was wrongfully taken, might have seized the property in respondent's possession under the writ of restitution. This certainly would have amounted to a satisfaction of the judgment in favor of Van Alstine and against respondent for the return of the property. If the property had been voluntarily returned by the respondent to Con Van Alstine, and by him to the rightful owners, it certainly would not be claimed that Mr. Van Alstine could thereupon have had an execution against respondent for the value of the property, in addition to its return. The effect of such a transaction would be a complete satisfaction of the judgment in favor of Van Alstine against respondent for the return of the property. Freeman, *Judgments* (4th ed.), § 462; *Hodson v. McConnel*, 12 Ill. 170; *Matter v. Phillips*, 52 Iowa, 232 (3 N. W. 49). If this is true, it follows that the owners of the property entitled to the possession were authorized to go directly to respondent in possession, and receive the property, or otherwise satisfy or release their claim for the return of the property. The

fact of such release or transfer of title and right of possession would operate as a satisfaction of the judgment for its return both by respondent to Van Alstine and by Van Alstine to the owner as much as if Van Alstine had received the property himself and returned it to the owners, for he could receive it only for the purpose of turning it over to the rightful owners. It makes no difference in this case that one of the owners of the property was the wife of appellant. The appellant, when the property was sold treated the wife's interest, whatever it was, as a separate interest of the wife. He sold it and purchased it as such. He cannot now be heard to say that it was not separate property. Furthermore, even if her interest was a community interest, it does not appear what the extent of her interest was. It may have been much or little. It does appear that she and another woman agreed to purchase the property, and that the other woman had some interest in it. The mere fact that appellant's wife has some interest in the property would not authorize the appellant to control the whole property, nor justify this court in reversing the case; especially where it appears that whatever interest the two women had was surrendered prior to the claim of the husband of any community interest therein.

We think the judgment of the lower court should be affirmed, and it is affirmed accordingly.

FULLERTON, C. J., and HADLEY, ANDERS and DUNBAR, JJ., concur.

[No. 4287. Decided April 6, 1903.]

A. H. NUNN, *Respondent*, v. J. EUGENE JORDAN, *Appellant*.

WITNESSES — CROSS-EXAMINATION.

Prejudicial error cannot be assigned upon the refusal of the court to permit cross-examination as to a certain matter, when the same ground had already been reasonably covered in prior cross-examination of the witness.

SAME — REPEATED EXAMINATION.

Where an extended examination has been had upon a certain subject in evidence, the refusal of the court to permit further examination going over the same ground would not be error.

TRIAL — ADMISSION OF EVIDENCE — COMMENTS BY COURT — HARMLESS ERROR.

An alleged copy of a disputed assignment being admissible on a showing that the original had been delivered to defendant who refused to produce it on demand, it was not prejudicial error for the court to remark, at the time the copy was offered in evidence, "It would be admissible for what it is worth—what it shows; just as much as the original would be," when subsequent testimony and instructions made it clear to the jury that defendant denied the existence of the original assignment.

SAME — INSTRUCTIONS — COMMENT ON EVIDENCE.

A comment by the court in his charge to the jury upon a matter not material under the issues would not constitute prejudicial error.

APPEAL — OBJECTIONS NOT URGED BELOW.

The objection that evidence admitted on the trial was hearsay cannot be raised for the first time on appeal, when specific objection on that ground was not urged below.

SAME — ERRORS NOT IN RECORD.

The exclusion of record evidence will not be considered on appeal, when such evidence was not formally offered on the trial and is not in the record on appeal.

PLEADING — GENERAL ISSUE — FAILURE OF CONSIDERATION.

A failure of consideration is not raised by an answer of general denial in an action on an instrument which imports a consideration.

Apr. 1903.] Opinion of the Court.—HADLEY, J.

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Affirmed.

James Hamilton Lewis and R. B. Albertson, for appellant.

Preston & Embree, for respondent.

The opinion of the court was delivered by

HADLEY, J.—Respondent brought this action against appellant for the recovery of money. The complaint alleges that on the 2d day of September, 1898, the Klondike, Yukon & Copper River Company, a corporation, was indebted to respondent in the sum of \$500 for services performed and for money furnished and advanced by him to said company; that on said date, for and in consideration of the sum of \$500, which appellant agreed and promised to pay respondent on demand, the respondent sold and, by written assignment, transferred and set over unto appellant his said demand for \$500 owing him from said company as aforesaid. It is averred that no part of said purchase price has been paid, and judgment is demanded for the sum of \$500, with interest at the legal rate from September 2, 1898. The answer is a general denial. A trial was had before a jury, resulting in a verdict in favor of respondent for the amount demanded in the complaint. From a judgment entered in accordance with the verdict, this appeal is prosecuted.

It is assigned that the court erred in refusing to permit appellant to cross-examine respondent concerning a letterpress copy of the assignment of said claim to appellant. Respondent had notified appellant to produce the original assignment, which he said was delivered to appellant. This was not done, and he thereupon sought to introduce what he testified was a copy of the original. Respondent testi-

fied that the copy was taken the day of its date, and in the letter book produced there was a copy of another writing, bearing a later date, which had been copied on a preceding page. Appellant's complaint is that he was not permitted to cross-examine in relation to said transposition of dates. Such cross-examination was not material, except in so far as it may have borne upon the credibility of the respondent's testimony concerning the assignment. The record, however, discloses that when respondent was being examined in chief, by way of identifying the copy, appellant's counsel asked and was granted leave to cross-examine the witness in relation thereto. The cross-examination continued for some time, covering the very ground which it is now urged he was prevented from covering. After some time, respondent objected, and the objection was sustained. In any event, the ground had already been reasonably covered, the witness had made his explanation, and we do not think prejudicial error was committed by sustaining the objection at the time it was done.

It is next urged that error was committed by the admission in evidence of the copy of the assignment, and by the remark of the court in connection therewith. The complaint alleged a written assignment. The witness testifies that the original thereof was delivered to appellant. Notice to produce it at the trial was shown. It was not produced. The writing offered was identified as a copy of the original. We know of no reason why it was not admissible under those conditions. The remark of the court urged as error was as follows: "It would be admissible for what it is worth—what it shows; just as much as the original would be." No exception was taken to this remark of the court. But in any event we do not see that the remark was necessarily prejudicial. The court did not say

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that the paper would conclusively prove what it showed, but that it was simply admissible for what it showed, as the original would be for the same purpose. It was made very clear to the jury, however, by the admission of subsequent testimony and by instructions, that appellant denied the existence of an original assignment; and, if they believed that to be true, they knew that the copy introduced did not prove what it purported to prove. In such event, they knew, as the court remarked, that it had been admitted for what it showed, and for what that showing was worth, but that, in the light of other evidence, its showing was valueless.

Respondent had been the agent at Seattle for the said Klondike, Yukon & Copper River Company. A certain dredger, with its equipment, belonging to said company, was stored in a warehouse in Seattle at the time respondent alleges he assigned his claim against said company to appellant. Respondent also claimed he had authority from the company to sell the dredger and apply the proceeds upon the payment of the company's debts, including his own claim. He testified that appellant wished to buy the dredger, and that it was agreed that he should pay respondent \$500 for his claim against the company, and might afterwards turn in the assigned claim to the company as a payment of \$500 upon the dredger, for which he agreed with respondent, representing the company, to pay \$700. It was shown that the two went to the warehouse together, and respondent turned over to appellant the dredger, whereupon appellant paid him some money. Appellant claims that he simply loaned the money, and took the dredger as a pledge for it, while respondent claims that, as agent for the company, he sold appellant the dredger; that the

money paid was to apply upon the balance of the agreed price for the dredger, over and above the amount of respondent's claim; and that appellant promised to pay the latter amount to him. Thus the dredger was turned over to appellant. At the trial there was much evidence about the subsequent history of the dredger, and appellant assigns as error that he was precluded from tracing this history. The record, however, discloses an extended examination upon that subject; and when the objection was made, which the court sustained, and upon which this alleged error is based, it was stated as a reason that the ground had already been gone over. The court reasonably and properly sustained the objection upon that ground.

Somewhat related to the subject last discussed is an error assigned upon the following words of the court in an instruction:

"It is conceded that the dredger was transferred and delivered to the defendant and re-stored by him in the warehouse in the name of his company, the Histogenetic Medicine Co., and that he has never returned or offered to return it to the original owners."

It is urged that such a concession was not made, and that the remark was an unwarranted comment upon the evidence. If the concession was not actually made in words, as we understand the record, appellant's own testimony and the admissions amounted practically to such concession. However, in the same instruction the court told the jury that matters pertaining to the dredger were immaterial, except in so far as they may throw light upon the subject of the assignment. The complaint simply alleged the assignment of an account to appellant for which he agreed to pay, and the suit was brought to recover upon that promise. The only essential facts under the issues

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were, did appellant buy the claim and agree to pay for it? It was immaterial what may have been done concerning a dredger. Nothing is said of a dredger in the complaint or answer. Whatever may pertain to the dredger relates only in an explanatory and historical way to the question of consideration for the assignment of the claim, and that question is not raised in the pleadings. The assignment is simply denied. If there was no assignment, there was no consideration. If there was an assignment, the consideration was a promise to pay money, and the dredger or its whereabouts became no part of it. We think in view of the issues and of the evidence as they stood, and also considering the whole instruction, the criticized words were not prejudicial.

It is next urged that the court erred in permitting respondent to testify as to what was said by the president of the said company, and also by members of a committee thereof, concerning the existence and amount of indebtedness of the corporation to respondent. It is claimed that such was hearsay testimony, and that, since the indebtedness was denied, it was erroneously admitted. We do not find that specific objection was made as to the bearing of the statements upon the question of indebtedness of the company to respondent. What was said by the witness upon that subject was incidental to what he stated as to authority given him by those representatives of the company to sell the dredger, and the court announced that the testimony was admitted as bearing upon the question of his authority to sell the dredger. Such appears to have been the only purpose in the mind of the court at the time, and counsel did not direct his attention to the further ground of objection. For the purpose stated by the court, we think the evidence was competent, and, since the court's

attention was not specifically called by objection to the bearing the testimony had upon the subject of the indebtedness of the company to the respondent, we think it should not now be held to be reversible error. Moreover, the essential inquiry was, had there been an assignment of account, and a promise to pay? If there was in fact no assignment, it was immaterial whether an indebtedness existed or not. If there was an assignment, then any claim as to the nonexistence or as to the amount of the indebtedness upon which such assignment was based relates only to the question of want or failure of consideration, which is not raised by the pleadings. The answer being a general denial, failure of consideration is not raised, within the rule followed by this court in *Griffith v. Wright*, 21 Wash. 494 (58 Pac. 582). In view of the issues, there was no prejudicial error under this assignment.

It is assigned that, inasmuch as respondent admitted that disbarment proceedings had been instituted against him in the state of Minnesota, the court erred in not permitting the record of his actual disbarment to be admitted in evidence. The record referred to was not identified, was not formally offered in evidence, and is not in the record before us. Whatever might be said under this assignment if the record were here, we shall not discuss the admissibility of record evidence not before us.

It is last insisted that a new trial should have been granted for reasons heretofore discussed, and for the further reason that the verdict is not sustained by the evidence. There is evidence in the record to support the verdict. The testimony is in hopeless conflict. It would be difficult to find a case where the principal parties in interest contradict each other more fully upon material matters. The jury have passed upon the evidence and we

Apr. 1903.] Opinion of the Court.—FULLERTON, C. J.

see no reason for disturbing the verdict. We believe the court did not err prejudicially, and the judgment is affirmed.

FULLERTON, C. J., and MOUNT, DUNBAR and ANDERS, JJ., concur.

[No. 4220. Decided April 6, 1903.]

GEORGE H. TILTON *et ux.*, Appellants, v. EDWARD O'SHEA
et al., Respondents.

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FORECLOSURE DECREE — COLLATERAL ATTACK — IRREGULARITIES — PUBLICATION OF SUMMONS PRIOR TO AFFIDAVIT.

The publication of summons in a foreclosure proceeding prior to the filing with the clerk of the court of the affidavit showing the existence of the necessary facts for publication, as required by Laws 1893, p. 410, § 9, is merely an irregularity, which is insufficient on collateral attack to warrant any finding against the validity of the foreclosure decree.

Appeal from Superior Court, Spokane County.—HON. WILLIAM E. RICHARDSON, Judge. Affirmed.

Gleeson & Stayt, for appellants.

P. F. Quinn, for respondents.

The opinion of the court was delivered by

FULLERTON, C. J.—Goodall and wife, being the owners of certain real property situate in Spokane county, mortgaged the same to the respondent Phineas J. Horwitz to secure a loan of \$6,000. Later they conveyed the property to the appellants. Thereafter Horwitz began proceedings to foreclose his mortgage, prosecuted the same to judgment and sale, became the purchaser at the sale, and entered into the possession of the property. Afterwards he sold the

property to the respondents, O'Shea. The appellants, assuming that the foreclosure proceedings were void, brought this action to redeem from the mortgage; treating the respondents as mortgagees in possession, and asking them to account, as such, for the rents, issues, and profits. Judgment went against them, from which they appeal.

The statute relating to the service of summons in force at the time the foreclosure proceedings were had (Laws 1893, p. 410, § 9) authorized the service of a summons by publication " . . . upon the filing of an affidavit . . . with the clerk of the court, . . . stating the existence of" certain facts. The record in the foreclosure proceedings shows that the summons in that case was published for the first time on the 27th day of April, 1895, while the affidavit for publication bears the file mark of the clerk of the court as of the 15th day of May following. The appellants were among the defendants on whom service was sought to be made by publication, and, as they were the owners of the legal title to the property, it is contended that this defect appearing on the face of the record renders the decree of foreclosure, and all of the proceedings had thereunder, null and void. There are cases which hold with this contention. It was so held in *Barber v. Morris*, 37 Minn. 194 (33 N. W. 559, 5 Am. St. Rep. 836), under a statute the exact counterpart of our own, and on a similar state of facts, and cases from other jurisdictions under somewhat similar statutes can be found. It seems to us, however, that these cases are unsound in principle. The filing of the affidavit is but one step in the preliminary proceedings leading up to the service. Its purpose is not to give the defendants notice, but to insure that a cause exists for service of summons in that particular manner. The omission in nowise detracts from the

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Syllabus.

amount of notice the defendants receive, nor can it in any manner affect any of their substantial rights. It is therefore but an irregularity—sufficient, perhaps, to warrant a reversal of a judgment on a direct appeal, but insufficient on a collateral attack to render the judgment void.

The judgment is affirmed.

MOUNT and DUNBAR, JJ., concur.

81 515
36 363

[No. 4404. Decided April 6, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. W. A.
LEWIS, *Appellant*.

CRIMINAL LAW — INFORMATION — SUFFICIENCY.

In a prosecution by information, it is not necessary that the information should allege that the grand jury was not in session, or that defendant had been committed on said charge by a magistrate, although such facts must exist in order to authorize the filing of an information.

SAME — COMMENCEMENT OF TRIAL — INDORSEMENT OF WITNESSES ON INFORMATION.

A trial does not begin until the acceptance and swearing of the jury, and the names of witnesses may properly be indorsed upon an information at any time prior to the commencement of the trial.

SAME — BILL OF PARTICULARS.

In a prosecution for embezzlement the refusal of the court to require a bill of particulars to be furnished is not erroneous, where the information presents a clear statement of facts in setting forth the facts constituting the crime with which defendant is charged.

SAME — FORMER JEOPARDY — DISCHARGE OF JURY ON HOLIDAY.

A holiday not being *dies non juridicus* but having only such sanctity as is attached to it by statute, the action of the court in discharging a jury in a criminal case on a holiday because of its inability to agree would not be a void act, under our statutes,

so as to constitute former jeopardy entitling the defendant to a discharge.

SAME — PLEADING — REPLY BY STATE UNNECESSARY.

It is not necessary for the state to avoid by reply any defense set up in a criminal case, as the only pleadings provided by statute on the part of the state are the information or indictment.

Appeal from Superior Court, Spokane County.—HON. FRANK H. RUDKIN, Judge. Affirmed.

T. C. Griffiths and *W. S. Lewis*, for appellant.

Horace Kimball, Prosecuting Attorney, and *Miles Poin-dexter*, for the State.

The opinion of the court was delivered by

DUNBAR, J.—The first assignment of error goes to the sufficiency of the information, which is as follows:

“That said defendant W. A. Lewis, in the county of Spokane, and state of Washington, on the 27th day of June, 1900, being then and there the agent and attorney at law of one Nettie Brauer Platt, as administratrix of the estate of J. Henry Brauer, deceased, she, the said Nettie Brauer Platt, being then and there the duly appointed, qualified and acting administratrix of the said estate, was then and there by virtue of being such agent and attorney at law, by the said Nettie Brauer Platt, as such administratrix, entrusted with the sum of fourteen hundred and seventy-nine and 42-100 dollars, lawful money current of the United States, of the value of fourteen hundred seventy-nine and 42-100 dollars, the said money being then and there the property of the said Nettie Brauer Platt, as such administratrix, the said W. A. Lewis, by virtue of being entrusted with the said money as aforesaid, and as, by virtue and on account of being such agent and attorney of the said Nettie Brauer Platt, as such administratrix, as aforesaid, did then and there receive and take into his possession the money aforesaid, which he, the said

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defendant, then and there held for, and in the name, and on account of, the said Nettie Brauer Platt, as such administratrix, and he, the said W. A. Lewis, did then and there as aforesaid wilfully, intentionally, wrongfully, unlawfully, fraudulently, and feloniously convert to his own use the said money, thereby committing the crime of larceny, contrary to the statute in such case made and provided and against the peace and dignity of the state of Washington."

This information complies so clearly and distinctly with the requirements of the statute that it precludes discussion as to the sufficiency of the facts stated. The verification also complies with the statute, and shows the condition precedent to the right to file the same. In addition to this, we held in *State v. Anderson*, 5 Wash. 350 (31 Pac. 969), and in subsequent cases, that, in the prosecution of a defendant by information, it was not necessary that the information should allege that there was no grand jury in session, and that defendant had been committed on said charge by a magistrate; that, notwithstanding such facts must exist to authorize the prosecuting attorney to file the information, it was not necessary that the existence or nonexistence of such facts should be made to appear upon the face of the information.

Regarding the alleged error in allowing indorsement of names of witnesses after commencement of trial, it seems that the names were indorsed before the acceptance and swearing in of the jury. It was decided by this court in *State v. Lee Doon*, 7 Wash. 308 (34 Pac. 1103), that the trial did not commence until the jury had been accepted and sworn, and that it was not error for the prosecuting attorney to indorse the names of witnesses upon the information before that time. In addition to this, it has been the uniform holding of this court that such indorsement after the commencement of the trial is not reversible error,

but may be ground for a continuance. *State v. John Port Townsend*, 7 Wash. 462 (35 Pac. 367), and many subsequent cases.

What we have said in relation to the alleged error of the court in refusing to sustain the motion to set aside the information will apply to the second assignment of error, in relation to overruling the demurrer to the information.

There was no error in denying challenge to panel and to jurors. There is no sufficient showing made that the jury commissioners did not substantially comply with the law, even though timely objection had been made. From a consideration of the whole examination of juror Tucker, we are satisfied that he was a disinterested juror. The same may be said of the qualifications of the juror Olsen.

Neither do we think there was any merit in defendant's motions to require the state to elect and to furnish a bill of particulars. We are unable to discover any duplicity or ambiguity in the information. It presents a clear statement of facts, and notifies the defendant what crime he is charged with committing, and what he is called upon to defend against as plainly as any bill of particulars could.

The next assignment of error is more troublesome. The trial upon which this conviction was obtained was the second trial of the cause. The first trial proceeded to the submission of the cause to the jury on December 31, 1901. On the first day of January, 1902, the court discharged the jury from a further consideration of the cause, he being convinced, as stated in the order, that the jury could not agree on a verdict; and it is earnestly contended by the appellant that, the first day of January being a non-judicial day, the action of the judge in discharging the jury was without authority of law and void; that by said action the court lost jurisdiction of the cause; and that,

appellant having been in jeopardy in the former trial, such trial is a bar to any subsequent prosecution, under the constitutional provision that no person shall be twice put in jeopardy for the same offense. It is insisted by the respondent that this point is not properly raised on this appeal, but, in consideration of the conclusion reached on the merits of the question, we will not pass upon the objection interposed to its consideration. Upon this subject there is a conflict of authority; most of the cases cited by the appellant, however, being cases where the judicial act challenged was done on Sunday. There is no distinction in our statute in this respect between Sunday and any other legal holiday, but the reason for sustaining objections to judicial acts on Sunday will not always apply to acts done on other holidays. For instance, one of the main cases on which appellant relies, viz., *Ex parte Tice*, 32 Ore. 179 (49 Pac. 1038), bases its decision largely on the assumed fact (over which there is a great diversity of judicial opinion) that at the common law Sunday was *dies non juridicus*, and that, the statutes of Oregon (which are similar to our statutes) not expressly conferring such right, the common law must obtain. The case is not pertinent here, for the reason that New Year's Day was not *dies non* at the common law. At the common law a holiday was not, as in the case of Sunday, *dies non juridicus*, and holidays have only the sanctity attached to them by statute. 20 Enc. Pl. & Pr., p. 1205. So that a great deal of the religious fervor and sentiment which characterized and probably prompted many of the early decisions in the Sunday cases would not be controlling or appropriate in a case of this kind. Some of the cases, however, have based their decisions squarely on the nature of the statute in relation to holidays. Among these is *Wearne v. Smith*,

32 Wis. 412. The case of *People v. Cage*, 48 Cal. 323 (17 Am. Rep. 436), cited by appellants, was based upon the fact that discretion of the court in discharging a jury unable to agree must be exercised upon some kind of evidence, that the judgment of the court on that point should be expressed in some form upon the record, and that it was not so expressed. That the court did not intend to decide that the jury could not be discharged if there was a necessity therefor and such necessity was shown by the record is conclusively shown by the fact that the same court, three months later, in *People v. Lightner*, 49 Cal. 226, held that the court had power to adjudicate the fact that a jury in a criminal case cannot agree, and could then continue the case until the next term. In *Thompson v. Church*, 13 Neb. 287 (13 N. W. 626), under a statute identical with ours, it was held that upon the return of a verdict it was the duty of a justice to render judgment at once. It is the universally accepted doctrine that under these restrictive statutes the court has a right to do any act that is necessitated by the right conferred, or that logically follows or is necessarily incidental thereto. Our statute expressly confers the right on the judge to instruct the jury on a holiday, when requested, and to receive the verdict when rendered. The supreme court of Illinois, in *Johnston v. People*, 31 Ill. 469, in discussing the term "necessity," said:

" . . . we are not to understand by the word 'necessity' a physical and absolute necessity, but a moral fitness or propriety of the work done under the circumstances of each particular case."

So here, there was not only a moral fitness and propriety in discharging the jury when it became evident that it could not agree, but such an act is incidental to the right

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to receive the verdict. Without attempting to discuss the multitude of cases cited in the brief on this subject, we are of the opinion that the former trial was not a bar to this action.

In response to the contention that appellant's plea of former acquittal was good upon its face, and that the only way of avoiding it is by reply, it may be suggested that our criminal procedure is statutory, and that there is no provision for any pleading on the part of the state except the information or indictment. There seems to be no merit in this assignment in any particular.

An examination of the record convinces us that there was no error in the admission or rejection of testimony. It is urged that the court erred in not submitting, in the first paragraph of the instructions, the question of former jeopardy and acquittal to the jury. In addition to the fact that the proper instruction was afterwards substantially given, we have been unable to discover any testimony on that point which would warrant an instruction. The introduction of the record raises the legal question which we have discussed above.

We have carefully examined the other errors assigned by appellant. In some instances they are not justified by the record, and, where they are, we are convinced by an examination of the record that no error was committed by the court either in giving or refusing instructions, with reference to the actions of the prosecuting attorney, or in any other particular. The evidence was amply sufficient to sustain the judgment, and, in the absence of legal error, it is affirmed.

FULLETON, C. J., and HADLEY, MOUNT and ANDERS, JJ., concur.

[No. 4497. Decided April 6, 1908.]

JOHN J. DECKER, *Appellant*, v. STIMSON MILL COMPANY,
Respondent.

MASTER AND SERVANT — SAFE PLACE TO WORK.

An employee of a saw mill who was injured by the giving way of a handrail against which he fell in attempting to cant a log on the log chute, cannot recover damages from his employer, where it appears that the rail was sufficient for its purpose—that of steadying persons passing up and down the chute—and that the accident of falling against the rail while canting logs was one which a reasonably careful employer could not be held to anticipate.

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Affirmed.

James E. Bradford (*George Cudhie* and *E. M. Farmer*, of counsel), for appellant.

Root, Palmer & Brown, for respondent.

The opinion of the court was delivered by

MOUNT, J.—Action for personal injuries. The lower court granted a nonsuit, on motion of respondent, after the plaintiff's evidence was all in, and dismissed the action. The appellant was employed by respondent for the purpose of rolling logs from a log chute to a logging deck in respondent's saw mill. Appellant had been engaged in this and other work for respondent several months, and was an experienced man at the business. On the second day of October, 1901, appellant undertook to roll a long log from the chute to the logging deck by means of a canthook, when he fell, striking against a railing which gave way, and he was precipitated to the ground below—some eighteen feet—and severely injured. The mill and

31	522
33	314
31	522
37	507
31	522
39	638
31	522
41	70
31	522
42	235

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log deck extended in a northerly and southerly direction. The log deck consisted of three main parts: (1) The easterly part was a passage way about two feet wide extending from the water below on an inclined plane to the mill above. Along the outer side of this passage way was a rail made of timbers two by three inches. This rail was fastened to the top of upright pieces of the same size, six feet apart and about three feet in height. At the bottom of the passageway, on the outer side thereof, was a board one by twelve inches, placed edgewise and extending the length of the passageway, fastened to the upright pieces. (2) Next to the passageway on the west was the log chute about eight feet wide. This log chute extended from the water to the mill, a distance of sixty feet, and on into the mill about thirty feet. On each side of this log chute were guides made by placing wide pieces of timber on the floor of the chute, and narrower pieces on top of these to the height of about fifteen or twenty inches. The object of these guides was to keep the logs within the chute. (3) The log deck proper was to the west of the log chute, at the northerly end thereof, within the mill. It was a platform about ten feet wide and thirty feet long. To the west of the log deck was a carriage, upon which the logs were carried to the saws. The log deck and the chute at the mill were about eighteen feet above the ground. At the time of the accident four small logs had been drawn up the log chute into the mill. Three of these logs were about thirty-two feet long, and the other one, lying to the east, was about forty feet in length. Appellant had rolled the three shorter logs from the chute to the log deck. He was attempting to roll the longer one when the accident occurred. This log, on account of its length, extended several feet outside of the mill. The chute inside of the

mill was nearly level, so that the part of the log which projected outside of the mill was a little above the floor of the chute. Appellant went outside with his canthook, so as to get a better hold of the log. He was standing in the passageway on the east of the log, attempting to roll the log west on to the log deck, when in some manner his canthook slipped, and he fell against the hand rail at his rear, on the east of the passageway. This rail, by force of his weight, gave way, and he fell below. The negligence claimed is (1) in the improper and negligent construction of the rail; (2) negligent use by respondent of unfit and unsuitable material in its construction; (3) negligently allowing said materials to be and remain, at the time said railing was built and at the time of the accident, cross-grained, weak, cracked, rotten, split, and unsound; (4) negligently failing to properly repair the same. Plaintiff's evidence showed that this rail was constructed for a hand rail in going up and down from the mill to the mill pond; that the twelve-inch board at the bottom, and parallel with the rail, was for the purpose of preventing chains which were thrown down the passage way from falling off at the side. It also showed that one of the upright pieces which held the rail, and the one which gave way, was cracked or checked at the bottom, where it was fastened to timbers supporting the passageway, and was somewhat decayed. It also showed that the railing had been inspected on the evening before the accident, and at that time was rigid and firm; that all the materials used in the construction of the rail, except the upright piece above referred to, were sound, and of the character usually employed for such purpose. One of plaintiff's witnesses testified that the upright piece which gave way had been nailed by driving three nails in a row close together at the time it was

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constructed, and that these nails had checked or cracked the upright piece, and that this was improper construction. He also testified that, if this upright piece had been properly nailed, it would have withstood the force of a man the size of appellant falling three feet against it. Appellant testified that he fell the distance of about one foot against it. Appellant also testified that it was usual for men working as he was to go where he did to roll long logs.

The pivotal question in this case is, was the respondent bound to anticipate accidents of this kind, and provide a railing strong enough to hold the weight of an employee falling against it? The railing in this case was sufficient for the purpose for which it was constructed, viz., as a hand rail for passers along the passageway. It was not sufficient as a protection against accidents of the kind which happened to appellant. There is no doubt that it was the duty of respondent to furnish appellant with a reasonably safe place in which to work, and to warn him of hidden or unseen dangers which were to him unknown, and which were or should have been known to the employer. If there had been no railing in the place where this one was, and the accident had happened as it did, respondent would not have been liable, because the place would have been reasonably safe without the railing, and appellant would have known as much about its dangerous character as his employer, and would have assumed the obvious risks. *Bullivant v. Spokane*, 14 Wash. 577 (45 Pac. 42); *Moulton v. Gage*, 138 Mass. 390; *Hoffman v. American Foundry Co.*, 18 Wash. 290 (51 Pac. 385); 1 Bailey, Master & Servant, § 62.

Whether or not it was the duty of the employer to place a solid rail along the passageway, not only as a protection for those whose duty it was to go up and down this way,

but also as a protection to persons employed in the chute and logging deck as appellant was employed, depends upon the question whether the respondent company, in the exercise of ordinary care and judgment, should have foreseen that such an accident might take place. The plaintiff himself testified upon this question. He said, in substance that the canthook frequently slips in such work, and that the operator sometimes loses his balance and falls. He also said that he never knew a man to fall against a railing before in such work, that he did not expect any such accident, and that no one would expect a man to fall against a railing. Other of his witnesses testified to the same effect. And this seems to us reasonable. Where a man is working upon the ground, he does not exercise the same care that he does when working upon a high platform. When he is working in the center of a high platform, he does not exercise the same care as when he is near the edge of it. He will naturally be more careful as the place is nearer obvious danger. No doubt for that reason the appellant never heard of such an accident, and the respondent did not, and ordinarily would not, anticipate it. If a reasonably careful employee would not anticipate falling against such a railing, a reasonably careful employer could not be held to anticipate it. The employer is not an insurer of his employees. When he has furnished a reasonably safe place for his employees to work in, his duty is done. A rail of the kind in question is notice of the danger line. It serves as a warning to that effect, in addition to its use as a hand rail. Since the respondent was not bound to construct the rail for the purpose of preventing employees from falling off the platform, there was no obligation to make it strong enough or high enough to prevent one falling over or through it. There can be

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no doubt that where a rail is constructed for a particular purpose, known to the employees, it must be sufficient to accomplish that purpose, and a person using it may confidently rely upon its safety for such purpose. But where it is constructed for a purpose which is known, it cannot be relied upon for another and different purpose—one which would be more severe upon it. For example, this railing was constructed as a hand rail to assist employees whose duty it was to pass up and down the inclined passageway. This purpose was known to appellant. It is conceded to have been sufficient for the purpose. If a number of employees had used it as a place to sit upon or rest upon without knowledge of the company, and it had given way, or if one workman had forced another through it, the respondent certainly would not be liable under such circumstances because it was not constructed for such purposes, and it could not be reasonably anticipated that it would be put to any such use. It is true that questions of this kind are usually questions of fact for the jury, but, where the facts and circumstances surrounding the case are such that reasonable men could not reasonably and properly find negligence therefrom, then it is the duty of the court to order a nonsuit. We think the court was right in this case.

Several questions relating to the admission of evidence in the case are argued in appellant's brief. But the ruling upon the merits above discussed makes it unnecessary to consider these assignments.

The judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY, DUNBAR and ANDERS, JJ., concur.

[No. 4260. Decided April 7, 1903.]

B. FUNK *et ux.*, Appellants, v. GUS HENSLER *et ux.*, Respondents.

APPEAL — TRIAL DE NOVO — INSUFFICIENCY OF EVIDENCE.

Where the evidence is conflicting, but the preponderance does not seem to be clearly against the findings of the trial court, such findings will not be disturbed on appeal, even in cases triable *de novo*.

SAME — IMPROPER ADMISSION OF EVIDENCE — REVERSAL.

When a cause is triable *de novo* on appeal, it will not be reversed for the improper admission of testimony when there is sufficient other competent testimony in the record to sustain the judgment.

RESULTING TRUST — PURCHASE OF REALTY.

The fact that plaintiff paid all the money required as the purchase price of a tract of land conveyed to defendant would not create a resulting trust in favor of plaintiff for the whole of such land, when the agreement between the parties was that plaintiff was to have but one-half of the tract for the money advanced by him.

Appeal from Superior Court, Skagit County.—Hon. JEREMIAH NETERER, Judge. Affirmed.

Clise & King and *Million & Houser*, for appellants.

Quinby, Wells & Brawley, for respondents.

The opinion of the court was delivered by

HADLEY, J.—Appellants brought this suit, and asked that respondents be declared to hold certain real estate in trust for appellants, and that they be required to convey the same to the latter. Appellants are husband and wife, and respondents are also husband and wife. The complaint alleges that appellants desired to purchase certain real estate in Anacortes, but were unable to negotiate there-

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for for the reason that they could not ascertain the whereabouts of the owner of the property; that, while endeavoring to find the location of such owner, respondent Gus Hensler learned of appellants' desire to purchase the property, called upon them, and told them that he knew the owner of the property, and if they would authorize him, as their agent, to negotiate the purchase for them, he would endeavor to do so to their best advantage; that by reason of such representations, and being moved thereby, they authorized said Hensler to make a purchase of the property for them, or such portion thereof as he might be able to purchase in pursuance of instructions they then gave him as their agent; that by said instructions they informed said Hensler, as their agent, that they had \$600 to invest in said property, and instructed him to purchase the south half of lots 18, 19 and 20 in block 34 of the city of Anacortes, and as much more of said lots as said \$600 would buy; that they thereupon gave him their check for \$600 for the said purpose; that he immediately negotiated a purchase of the whole of said lots for the \$600 so furnished him, and took a deed therefor in his own name; that thereafter, in violation of his trust and of the confidence reposed in him by appellants and with intent and design to take advantage thereof, he represented to appellants that he was required to pay \$600 for the south half of said lots, which south half he then conveyed over to them in pretended compliance with his trust; and, after the last-mentioned conveyance was made appellants were informed of the real facts, and, immediately after learning them, demanded of said Hensler that he convey to them the remaining portion of said lots—the north half thereof—which demand was refused. The only allegation of the complaint involving respondent

Annie Hensler is that she claims a community interest in the property, and that any interest she may have therein was acquired with full knowledge of the above alleged rights of appellants. Respondents answered the complaint separately. Annie Hensler denies the allegations of the complaint, except that she admits she claims a community interest in the property. Gus Hensler denies the material averments of the complaint, and affirmatively avers that about the last of the year 1897, or early in the year 1898, he began negotiations for the purchase of the whole of the lots aforesaid; that early in the year 1898 he submitted a price of \$700 on condition that the major part thereof should be paid by deferred payments; that the offer was declined, and he then offered \$600 cash, which was accepted, with the promise that the deed of the vendor should, as soon as possible, be sent to the banking house of Schricker & Andrews, at La Conner, Wash., where payment was to be made; that after this time he learned that appellant V. Funk desired to purchase the south half of said lots, and he thereupon saw the latter, and informed him that he (said respondent) was the owner, or was about to become the owner, of the lots; that said appellant then offered to purchase the south half of the lots, and asked the price; that said respondent asked him \$700, which he declined to pay, but afterwards offered \$600, which offer was accepted; that on or about the 27th day of July, 1898, said respondent received notification that the deed aforesaid had been sent to the bank, but on inspection it was found not to be properly drawn; that the deed was returned to the grantor, and on August 13th following a new deed, bearing the same date as the former one, was sent to the bank; that after the return of the defective deed, and before the corrected one was forwarded, said respondent

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ent, being short of cash at the time, stated to said appellant that it would be an accommodation if he would advance the amount of the purchase price agreed upon, so that said respondent could have it at the bank when the corrected deed should arrive; that said request was granted on or about the date alleged in the complaint, and a check for \$600 was handed said respondent on or about August 6, 1898, which was indorsed and sent to the bank; that, at the time the check was delivered, said appellant requested said respondent to make out the deed for the south half of said lots to appellant B. Funk, the wife of the former, and that the same was so made out and delivered by both respondents on August 15, 1898; that, at the time of purchasing said south half of said lots, appellants well knew that said respondent was or soon would become the owner of said lots, and that no mention was evermade by either appellant of purchasing more than the south half of the lots; that said respondent never acted as the agent of appellants, or either of them, in said transaction, or in any transaction relating to the lots, and he was never requested to act as such agent; that no payment or offer of payment or compensation has ever been made for services of said respondent, notwithstanding the fact that he was at considerable expense in obtaining title, including one trip to Vancouver, British Columbia. Upon the above issues the cause was tried by the court without a jury, resulting in a judgment and decree that appellants have no right, title, or interest in or to the north half of said lots, and that the same is the property of respondents. From said judgment this appeal was taken.

The assignments of error are almost wholly based upon exceptions to the court's findings, and upon its refusal to find as requested. We have read the evidence, and find it

conflicting. We have at some length set out above the averments of the parties in their pleadings, and by reference thereto, without repeating, it is only necessary to say here that the testimony of respondent Gus Hensler substantially supports in detail the averments of his answer above outlined. That of appellants is largely in support of the allegations of their complaint as we have stated them. There does seem, however, to be a substantial departure in one part of their testimony from the statements of their complaint. They allege that they entered into an arrangement with respondent Gus Hensler to make him their agent to purchase said property, and that they reposed trust and confidence in him as such. But in their testimony they both say that Mr. Hensler told them when they first talked of the purchase that he was the agent for the owner of the property. The relation shown by the testimony is altogether different from that alleged in the complaint, and we think the two are inconsistent. To have been the agent of appellants to purchase as much of said property as he could for \$600 was wholly incompatible with said respondent's being the agent of the owner, upon whom, as such, devolved the duty to sell as small a portion of the lots for \$600 as he could. This testimony of each appellant showed that they were warned in the beginning that said respondent sustained such a fiduciary relation to the vendor as made it impossible for him to sustain a like relation to them in the premises. Such being their knowledge from the beginning, under the theory of their testimony we do not see how they may be said to have been justified in relying upon him with trust and confidence in their own behalf in a matter which would conflict with his known duties elsewhere. Under such circumstances, they knew he could not be true to both as an agent. This varia-

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tion in the testimony from the theory and allegations of the complaint may have been a circumstance which led the trial court to the view that the preponderance of the evidence was with respondents. The trial court heard these parties testify, was impressed with the accuracy or want of accuracy of their statements from the personality of the witnesses as they appeared before him, and, in view of the testimony as it appears in the record, we do not think we should undertake to say that the preponderance of the evidence is clearly against the findings. Unless it so appears, this court has adopted the rule, even on trials *de novo*, that it will not disturb the findings. *Washington Dredging, etc., Co. v. Partridge*, 19 Wash. 62 (52 Pac. 523), and other cases there cited.

It is further urged that, even if it shall be found that the contract creating a fiduciary relation, and an implied trust, arising from breach of such contract, have not been established by the evidence, still the complaint is also based upon the further theory that a resulting trust has arisen, from the fact that the purchase money was paid by appellants, and title taken in the name of respondents. It is true, it appeared in evidence, and the court found, that the \$600 paid by appellants became the purchase money for the whole of the lots; but it was further found that respondent Gus Hensler had completed negotiations for the purchase of the whole of the lots for \$600 more than a month before negotiations began between him and appellants, and, further, that his negotiations with the latter began with a plain offer to sell them the south half of the lots, and ended with an agreement on their part to buy said south half for said sum of \$600. The court also found that the advancement of the \$600 was made by appellants on the promise of said Hensler that when he received

his deed for the lots he would convey to appellants the said south half. Under those findings, no resulting trust could arise in favor of appellants for the other half of the lots. They received just what they agreed to buy, and that for which they paid their money. Under such circumstances, it could not have been the intention of the parties that appellants were purchasing the north half of the lots, and a resulting trust cannot arise in opposition to the intention of the parties. 10 Am. & Eng. Enc. Law, p. 14. The following cases cited in support of the text are all in point: *White v. Carpenter*, 2 Paige, 217; *Steere v. Steere*, 5 Johns. Ch. 1 (9 Am. Dec. 256); *Elliott v. Armstrong*, 2 Blackf. 198; *Philips v. Crammond*, 2 Wash. C. C. 441 (Fed. Cas. No. 11,092). Under the theory of the complaint, respondent Gus Hensler was appellant's agent to buy the property; and yet it appeared in evidence that he was at considerable trouble and expense in making the purchase, including one trip to British Columbia, and other expense. It is not averred that any compensation was to be paid the alleged agent, or that the reasonable expenses were to be paid, and no offer to pay them is alleged. It nowhere appears that appellants paid or expected to pay the expenses and advancements made by said respondent. This is a circumstance that supports the court's findings, which establish such facts as preclude the theory that the intention of the parties was such as would create a resulting trust for the whole of the property. It is not reasonable that said respondent would donate his time and money without reimbursement.

It is assigned that error was committed in admitting in evidence certain letterpress copies of letters written by respondent Gus Hensler to the vendor of the property, and also of replies thereto. These letters concerned the nego-

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tiations leading up to the purchase of the property, and were not material, except as they may have tended to support said respondent's testimony that he was negotiating for the purchase of the whole of the property from the beginning. That fact is, however, supported by other evidence. When a cause is triable *de novo* here, it will not be reversed for the improper admission of testimony when there is sufficient other competent testimony in the record to sustain the judgment. Under our views of the case, it is therefore unnecessary to discuss the admissibility of the alleged objectionable evidence.

The judgment is affirmed.

FULLERTON, C. J., and MOUNT, DUNBAR, and ANDERS, JJ., concur.

[No. 4209. Decided April 9, 1903.]

J. B. CHAPIN, *Respondent*, v. CITY OF PORT ANGELES *et al.*, *Appellants*.

APPEAL — DISMISSAL — GROUNDS — FAILURE TO FILE TRANSCRIPT PRIOR TO SERVING BRIEF.

Failure to file transcript before service of appellant's brief, as required by Laws 1901, p. 29, § 2, is not ground for dismissal, nor for the imposition of terms, where the transcript was supplied the same day the motion to dismiss was served, and one week before it was filed in the supreme court.

SAME — DEPRIVING RESPONDENT OF OPPORTUNITY TO SEE TRANSCRIPT.

The action of appellant in causing the transcript on appeal to be forwarded to the supreme court on the same day his brief is filed is not ground for dismissal, inasmuch as timely application by respondent would secure a return of the transcript for use in preparation of his answering brief.

SAME — EXTENSION OF TIME FOR FILING BRIEFS — PRESUMPTIONS.

An order of the lower court extending the time for filing briefs will be presumed not to be an abuse of discretion when the order

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recites that good cause was shown and there is nothing clearly showing the contrary.

MANDAMUS — ALTERNATIVE WRIT — INSUFFICIENCY OF ALLEGATIONS.

An alternative writ of mandate to compel a municipal corporation to issue a warrant upon a judgment against it is demurrable for want of facts, when it fails to allege that the judgment was satisfied by petitioner and a certified copy thereof presented to the city, as required by Bal. Code, § 5676.

SAME.

A petition for an alternative writ of mandate which refers to an affidavit filed in support of a prior writ that had been quashed is insufficient, where some of the necessary elements showing the right to the writ are omitted from the petition but are contained in such affidavit, and the affidavit is not served with the amended petition. (*State ex rel. King v. Trimbell*, 12 Wash. 440, distinguished.)

SAME — ISSUANCE OF WARRANTS AGAINST PARTICULAR FUND.

An alternative writ of mandate does not state facts sufficient when it recites that petitioner is entitled to a warrant upon the current expense fund of the defendant city in satisfaction of a judgment, but no allegations are contained in the writ showing under what kind of contract the obligation which was merged in the judgment arose, nor against what fund it was a charge when the contract was made (*Townsend Gas, etc., Co. v. Hill*, 24 Wash. 469, distinguished).

SAME — REFUSAL OF PUBLIC OFFICER TO DISCHARGE DUTY — REMEDY BY ATTACHMENT — ADEQUACY.

The remedy provided by attachment, under Bal. Code, § 5677, against an officer of a public corporation who shall fail or refuse to satisfy a judgment against it in compliance with the provisions therefor in Id., § 5676, would not exclude the remedy by mandamus, since the former would not be wholly adequate to compel the specific act affording the necessary relief to be done.

Appeal from Superior Court, Clallam County.—Hon. GEORGE C. HATCH, Judge. Reversed.

James Stewart, for appellants.

A. A. Richardson, for respondent.

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The opinion of the court was delivered by

HADLEY, J.—Respondent moves to dismiss this appeal under § 2, p. 29 of the Session Laws of 1901, which requires a transcript to be prepared, certified, and filed in the office of the clerk of the superior court, at or before the time when appellant shall serve and file his opening brief. Appellants' opening brief and transcript were both filed on the 14th day of February, 1902. The motion to dismiss the appeal appears to have been served the same day, and seems to have been filed with the clerk of the superior court as well as in this court. The former filing was on February 17th, and the latter on the 21st of the same month. We have already held that the statute cited does not reach the jurisdiction of this court, but that it is directory only, and establishes a mere statutory rule of procedure, violation of which does not of itself oust the jurisdiction. *Prescott v. Puget Sound Bridge & D. Co.*, 30 Wash 158 (70 Pac. 252). In the above case we denied the motion to dismiss the appeal, but imposed terms for the violation of the rule; providing, however, that the appeal would be dismissed for failure to comply with the terms. In *Raymond v. Bales*, 26 Wash. 493 (67 Pac. 269), a similar motion, not made until after the record was actually supplied, was denied without the imposition of any terms. In the case at bar the record was supplied the same day the motion was served, and one week before it was filed here. With the record so promptly supplied, we can see no occasion for afterwards filing the motion here, and we do not think such circumstances call for the imposition of terms. Respondent further complains that appellants caused the transcript to be at once forwarded to this court, and that he was thereby deprived of the use of it while preparing his answering brief. But the forwarding of the record to this

court within statutory time cannot be ground for dismissal. If respondent, under the circumstances, had made timely application here for the return of the transcript for the purpose of preparing his brief, it would doubtless have been returned. It is further urged that the appellants' brief was not filed in time, for the reason that the court abused its discretion in extending the time to file briefs, no sufficient cause appearing. The order entered by the court, however, states that good cause was shown, and we will presume that such was the case, unless the contrary clearly appeared, which is not the case. The motion to dismiss is denied.

Respondent applied to the superior court for a writ of mandate directed to appellants, requiring the issuance of a warrant to him for the amount of a judgment theretofore recovered by him against the city of Port Angeles. As the basis of the application, an affidavit was served and filed on August 26, 1901. An alternative writ of mandate was issued, and was afterwards quashed or stricken from the files. On September 21, 1901, a new alternative writ was issued, and served upon the same day. No affidavit was served with the last-named writ, but reference was made therein to the affidavit previously served and filed on August 26th, as aforesaid, and the writ recited that said affidavit was made a part thereof. Appellants demurred to the last-named writ, which demurrer was overruled. They thereupon elected to stand upon their demurrer, and declined to plead further. The court afterwards entered findings of facts, conclusions of law, and judgment that a peremptory writ of mandate should issue against appellants, from which judgment they have appealed.

It is assigned as error that the court overruled appellants' demurrer to the alternative writ of mandate, on the ground that the writ does not state a cause of action. It

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will be remembered from the foregoing statement that no affidavit was served with the new writ, but reference is made to the one served and filed near a month prior to that time when the first writ was issued. The service of the alternative writ was the process by which respondent was brought into court, and the necessary elements of that process are defined by statute. When, therefore, the first writ was quashed, the case stood as if no process had ever been served, and the respondent was not in court. He was brought into court by the service of the second writ. Is that writ sufficient under our statute? Section 5757, Bal. Code, provides that "the alternative writ must state generally the allegation against the party to whom it is directed, and command such party, immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed," Manifestly the allegations referred to in the statute must be such as show upon their face that the act commanded to be done is the discharge of a duty, and not in conflict with any legal requirements. In other words, the writ should state a cause of action and ground for relief against the respondent. It is urged that the writ in this case does not state facts sufficient to warrant the relief asked, since it does not allege that respondent's judgment against the city was ever satisfied, and a certified transcript of the docket thereof presented to appellants, as required by § 5676, Bal. Code. A failure to comply with the above statute, we think, would be fatal to the right to maintain this suit, and yet it is not alleged in the writ that it was done. Respondent argues that since the writ makes reference to a certain affidavit filed at some other time in the cause, and served as a part of the first writ that was annulled, we should go to that affidavit to find the allegations upon this subject. It appears

that the affidavit formerly served did contain an allegation upon the subject, but it was not served with the latter writ. The statute seems to contemplate that the writ itself shall contain the required allegations, but this court did intimate, without deciding, in *State ex rel. King v. Trimbell*, 12 Wash. 440 (41 Pac. 183), that it may not be necessary to recite the facts in the writ "if the affidavit upon which it is founded is referred to therein and served therewith." It will be observed that the suggestion made in the above case, that the writ may perhaps be sufficient if the affidavit contains the necessary allegations, is accompanied with the further requirement that the affidavit must be served with the writ. The suggestion in the opinion mentioned is a liberal view of the statute, and yet, in indicating that liberal view, the court was careful to hedge it with a remark from which it must be inferred that service of a writ without the required allegations is not good unless accompanied by service of an affidavit that does contain them. Certainly the liberal view suggested in the former case is as far as we would be justified in going, and that view can only be reconciled with the statute by the argument that such an affidavit, when referred to in the writ and served with it, becomes actually a part of it. No affidavit being served with the writ in this case, the writ itself contains the only allegations challenged by the demurrer. For reasons already stated, there being no allegation that the judgment was satisfied and that a certificate of such satisfaction had been presented to appellants, it follows that sufficient facts are not stated to entitle respondent to a warrant, and the demurrer should have been sustained.

It is further insisted that, even if the fact were alleged that the judgment was satisfied and a certificate thereof properly presented to appellants, still mandamus is not

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a proper remedy, in view of the fact that another remedy is provided by § 5677, Bal. Code. That section is as follows:

“Should the proper officer of said corporation fail or refuse to satisfy said judgment, as in the preceding section provided, an attachment may be issued to compel his performance of said duty.”

If the above statute provides a remedy, it is doubtful if it is an adequate one. In view of the provisions of § 5755, Bal. Code, we think mandamus will lie to compel the performance of such an official duty as is sought to be reached here. Assuming that the statute quoted above may furnish a remedy, the two are in that event concurrent, and either may be pursued. But the remedy by attachment is criminal in its nature, and “a remedy by criminal prosecution or an action on the case for neglect of duty will not supersede that by mandamus, since it cannot compel a specific act to be done, and is, therefore, not equally convenient, beneficial and effectual.” 14 Am. & Eng. Enc. Law, p. 103. Mandamus has been approved by this court as a proper remedy in such cases as this, although the precise question presented here does not seem to have been raised. *State ex rel. Porter v. Headlee*, 18 Wash. 220 (51 Pac. 369); *Townsend Gas, etc., Co. v. Hill*, 24 Wash. 469 (64 Pac. 778). We think this objection of appellants is not well taken. It is recited in the alternative writ that respondent is entitled to a warrant upon the current expense fund of the city of Port Angeles, and the command is that such a one shall be issued. There is, however, no recital of facts which show him to be entitled to such warrant, unless it be the bare statement that he obtained his judgment October 29, 1897. He insists that under the rule in *Townsend Gas etc., Co. v. Hill*, *supra*, as the amount of his claim was not fixed and ascertained at the time the current expense fund

was instituted by Laws of 1897, p. 222, c. 84, he is therefore entitled to a warrant upon that fund. It appeared in that case, however, that the obligation created by the contract was against the former general fund, and that, since that fund had been abolished by law, a claim of the character involved should be paid from the current expense fund. It may be that the facts in respondent's case are similar, and such as would make his claim a charge against the current expense fund. But the writ contains no allegation showing under what kind of contract the obligation which was merged in the judgment arose. The facts are not alleged which show against what fund it was a charge when the contract was made. For this reason, also, we think the writ does not state sufficient facts as the basis of the relief sought.

We think the court erred in overruling appellants' demurrer. The judgment is therefore reversed, and the cause remanded, with instructions to the lower court to sustain the demurrer.

FULLERTON, C. J., and MOUNT, ANDERS and DUNBAR, JJ., concur.

[No. 4425. Decided April 9, 1903.]

WILBUR J. YARWOOD, *Appellant*, v. A. C. BILLINGS *et al.*,
Appellants.

PARTNERSHIP — ACTION FOR ACCOUNTING — JUDGMENT.

In an action for an accounting between partners, a court of equity has power not only to state the account between the parties, but to enter a money judgment in favor of one and against another, as the state of the account may require.

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Opinion Per Curiam.

SAME — CONVERSION — OUTSIDE THE ISSUES.

Where a suit is in equity for an accounting and partition of personal property between partners, and not an action at law for conversion, the refusal of the court to enter judgment in favor of plaintiff for the value of the property would not be error, although defendants had refused to acknowledge his right of possession when demand was made upon them.

TRIAL ON WRONG THEORY — WHEN WITHOUT PREJUDICE.

Where the theory on which a case was tried was adopted on the insistence of defendants, over the objection of plaintiff, they cannot urge on appeal that it was an erroneous theory, or without the issues made by the pleadings.

Appeal from Superior Court, Lincoln County.—Hon. CHARLES H. NEAL, Judge. Modified.

H. N. Martin and *Happy & Hindman*, for plaintiff.

Merritt & Merritt, for defendants.

PER CURIAM.—This is an action in which the plaintiff sues the defendants for the partition of certain personal property owned by them as tenants in common, and for an accounting of the profits received therefrom by the defendants while it was in their possession and used by them. From the judgment both sides appeal.

Taking up the defendants' appeal, they first contend that this is a suit in equity for an accounting between partners and that a court of equity in such a suit has no power to enter a money judgment against any of the parties thereto. This is not the rule. A court of equity has power in such a suit not only to state the account between the parties but to enter a judgment in favor of one and against another, as the state of the account may require. It never drives the parties to a second action to enforce its award. It is next objected that the finding that the parties settled their mutual accounts for the year 1894 is not supported by the evidence. This objection we think is well taken.

It is not only testified by the defendants that no such settlement was had, but it is so testified by the plaintiff himself. This year should have been included in the accounting; and as it appeared by the undisputed evidence that there was a loss during the year in running the machine, of which the plaintiff's share was \$211, this amount should have been allowed the defendants. The other assignments of error are not open to defendants in this court. The theory on which the case was tried was adopted on their insistence, over the objection of the other side, and they cannot now be heard to complain that it was an erroneous theory, or without the issues made by the pleadings.

The plaintiff assigns error on the refusal of the court to enter a judgment in his favor against the defendants for the admitted value of the common property; it being contended that their refusal to acknowledge his right of possession when demand was made amounted to a conversion. But we fail to find error here. The suit is in equity for an accounting and partition, not an action at law for conversion, and the judgment followed the prayer of the complaint, and was fully as equitable as the circumstances of the case warranted.

The judgment appealed from will therefore be modified by reducing the amount of the joint judgment against the defendants to \$327; standing affirmed in all other respects. The defendants will recover their costs on this appeal.

[No. 4616. Decided April 9, 1903.]

WILLIAM CLIFFORD, *Appellant*, v. F. A. DRYDEN, *Superintendent of the Washington State Penitentiary, Respondent*.

CRIMINAL LAW — TRIAL OF CONVICT UNDER SENTENCE UPON ANOTHER CHARGE.

The superior court of a county has jurisdiction to remove from the penitentiary a convict under sentence, for the purpose of trying him upon another charge and of re-sentencing him, in case of conviction, to a term beginning at the expiration of the current term which he is serving.

Appeal from Superior Court, Walla Walla County.—
Hon. THOMAS H. BRENTS, Judge. Affirmed.

John H. Pedigo, for appellant.

Lester S. Wilson, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—On the 10th day of January, 1903, William Clifford petitioned the superior court of Walla Walla county for a writ of habeas corpus, alleging that he was illegally restrained of his liberty by F. A. Dryden, superintendent of the penitentiary of the state of Washington at Walla Walla. On the same day the said superior court issued a writ of habeas corpus directing and commanding the said superintendent to bring the body of said Clifford before said court on said day and show cause why said Clifford should not be discharged. In obedience to said writ said superintendent produced in court the body of the said Clifford, and in his return set out fully his authority for detaining said Clifford. At the hearing the following stipulation was entered into by the parties:

"It is hereby stipulated and agreed by and between the respective parties hereto that the following are the facts in this case: That the petitioner William Clifford was, on the 29th day of May, 1900, in the superior court of the state of Washington in and for the county of Whitman, in case No. 7,671, informed against, tried, convicted and sentenced to the penitentiary of said state for a period of three years, and, in pursuance of said judgment and sentence, the said Clifford was duly delivered to the proper officer of said penitentiary and confined therein until on or about the 8th day of April, 1901; and on the 6th day of April, 1901, the superior court of Whitman county, said state, made and entered an order directing the sheriff of said Whitman county to proceed to said penitentiary and there apprehend the said William Clifford, convict No. 2,208, and convey him to the county jail of said Whitman county, and the said court further ordered the warden of said penitentiary to deliver said William Clifford into the custody of said sheriff; that, in pursuance of said last mentioned order, the said sheriff, on the said 8th day of April, 1901, delivered to said warden a copy of said last mentioned order, and thereupon demanded said warden to deliver the custody of said William Clifford; that said warden thereupon delivered said William Clifford to said sheriff under protest; that said sheriff there and then compelled said Clifford to accompany him to said Whitman county; that thereafter said Clifford was confined in said jail of Whitman county until the 13th day of June, 1901; that on said 13th day of June, 1901, said William Clifford was informed against, tried, convicted and sentenced by the superior court of said Whitman county, in case No. 7,944, to the said penitentiary for a term of one year, to commence upon the expiration of the sentence in case No. 7,671; that said sentence in case No. 7,671 fully expired on the 19th day of August, 1902; that the alleged crime for which said William Clifford was tried, convicted and sentenced on the 13th day of June, 1901, in case No. 7,944, was alleged to have been committed prior to his first sen-

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tence in case No. 7,671, towit, prior to the 29th day of May, 1900.

"The only question to be determined by the court in this case is: Did the superior court of the county of Whitman have jurisdiction and power to remove from the penitentiary this convict, and to hear, try, and determine case No. 7,944 against him, and re-sentence him to a term of one year in the penitentiary, said term to begin at the expiration of the three year term in case No. 7,671."

It is the contention of the appellant that the superior court of Whitman county did not have authority to make the order requiring the sheriff to proceed to the penitentiary and apprehend him while in the custody of the warden; that, said order being void, no jurisdiction was ever acquired by the court to try the cause, and that, therefore, the judgment of June 13, 1901, is also void. No authorities are submitted by the appellant, but the sole argument is that the defendant could not have a fair trial by reason of the fact that the jury, knowing him to be a convict, would be prejudiced against him to such an extent that it could not do him justice. There is nothing in the record to indicate that there was anything in the appearance of the appellant at the trial which would suggest to the jury the fact that he was a convict. But, even if there were, that would simply be both the fault and the misfortune of the defendant, and should not be allowed to interfere with the regular and orderly administration of justice. The presumption must be that he was rightfully convicted in the preceding case; therefore the position in which he finds himself before the jury is a position necessitated by his own wrong, and he cannot plead it for the purpose of postponing or even defeating a legitimate prosecution. It might very reasonably happen, considering the difficulty of preserving and perpetuating testimony, that, if the second

trial were postponed until after a lengthy sentence had been served, it would result in a failure of justice. In this case, it is true, the sentence was a short one, but the principle contended for will apply as if the sentence were a long one.

The respondent has filed a supplemental record tending to show that the appellant had in the prior action demanded that he receive his sentence and be taken to the penitentiary before he was tried upon the second information. The appellant moves the court to strike this supplemental record, for the reason that it conflicts with the stipulation upon which the cause was tried. It seems to us that it in no way conflicts with the stipulation; but, even if it were not admissible as testimony, it presents a pertinent supposititious case of the undue advantage which could be taken of the law by a defendant under like circumstances, if his contention were sustained, and furnishes a potent argument against such a construction of the law. Criminal prosecutions in this state are statutory. The law provides generally for the trial and punishment of its violator, and, unless such violator is excepted from such general provisions, even though he may be an inmate of a penitentiary, he has no just cause for complaint. In *State v. Connell*, 49 Mo. 282, the same contention was made by the defendant as is made by the appellant in this case, as is shown by the following excerpt from the argument of defendant's counsel in that case:

"There was no authority in law for taking him out of the custody of the warden for a moment, except to testify as a witness in certain cases, or for the purpose of inquiring into the legality of his confinement. And he certainly did not appear voluntarily. The circuit court under the law could acquire no jurisdiction over the person of the defendant, and as a matter of fact never did acquire any.

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Syllabus.

Admitting that he might be lawfully tried, the second sentence could take effect only at the expiration of the first, or when he was pardoned by the executive. The judgment of the circuit court of Boone county, as commuted or changed by the order of the governor, requires the defendant to remain in the custody of the warden for life. This judgment and the executive order are still in force. Can another court of no higher jurisdiction direct its sheriff to take him out of the custody of the warden, where under the law he rightly belongs? Can the warden, under the law and under the order of the governor, surrender him to the sheriff for any such purpose? We submit that, in the absence of any statute authorizing it, it cannot be done."

But it was held in that case that the court had jurisdiction to make the order to try the cause during the term of imprisonment. To the same effect are *People v. Majors*, 65 Cal. 138 (3 Pac. 597, 52 Am. Rep. 295), and *People v. Flynn*, 7 Utah, 378 (26 Pac. 1114).

The judgment is affirmed.

FULLERTON, C. J., and HADLEY, MOUNT and ANDERS, JJ., concur.

[No. 4205. Decided April 10, 1903.]

THOMAS F. MEAGHER, *Appellant*, v. CITY OF SPRAGUE,
Respondent.

TAX SALE — SALE BY CITY OF THIRD CLASS — INTEREST ACQUIRED BY
PURCHASE — RIGHT OF REDEMPTION FROM OTHER SALES.

Where a city of the third class became the purchaser of land at a city tax sale which was conducted in pursuance of the provisions of Bal. Code, § 945, authorizing both summary procedure and action in court for the enforcement of delinquent taxes, the return of sale, although irregular, with the judgment and confirmation of sale, and the entry by the city into possession of

the property, together constituted evidence of the ownership of such interest in the land, within the meaning of Bal. Code, § 1752, as would entitle the city to redeem from a subsequent certificate of delinquency issued by the county to one who had knowledge of the city's possession and assertion of ownership.

SAME — REDEMPTION — SUFFICIENCY OF PAYMENT — RIGHT TO RAISE QUESTION.

The question of whether the county had exacted the full amount due for delinquent taxes upon the issuance of a complete certificate of redemption cannot be litigated in an action to foreclose a delinquency certificate, where the county is not a party to the action.

Appeal from Superior Court, Lincoln County.—Hon. CHARLES H. NEAL, Judge. Affirmed.

Myers & Warren, for appellant.

Samuel R. Stern, for respondent.

The opinion of the court was delivered by

HADLEY, J.—Appellant instituted this suit to foreclose upon a tax certificate of delinquency for \$15.85, issued by the county of Lincoln against a certain lot in the city of Sprague, in said county, for unpaid taxes of the year 1896. The application for judgment states that the tax was assessed against the property as that of Frank Hand, and he was the only party defendant in the complaint as filed. It is also alleged that appellant afterwards paid taxes for both prior and subsequent years, amounting in all to \$169.72. As the full amount paid, with interest, appellant demands judgment and foreclosure of the tax lien for \$266.51. The defendant Hand was adjudged to be in default, but the city of Sprague was, upon application, permitted to intervene in the cause. The complaint in intervention alleges that said city is the owner and in possession of the lot in question, and on January 12, 1901, defendant redeemed from

appellant's aforesaid certificate of delinquency for the taxes of 1896, and at the same time redeemed from the taxes of all other years that had then been paid by appellant; that the treasurer of Lincoln county issued to said city a certificate of redemption from said delinquency certificate and from all of said other taxes. The city prays judgment quieting its title in said lot. Appellant answered the intervention complaint and denied that the city was then, or ever had been, the owner and in possession of the said real estate. He also denied that the city had ever redeemed from said certificate of delinquency. The cause was tried by the court without a jury, and resulted in a decree in favor of the intervenor, to the effect that said city's title is quieted as against said certificate, and as against other taxes which had been paid by appellant as aforesaid. From said judgment this appeal was taken.

It is the contention of appellant that the city was not the owner of the property, and therefore could not redeem from the certificate which he held, and from the other taxes which he paid. The evidence shows that the city had for some years been in possession of the lot, and had constructed upon a portion of it buildings for its use, which were occupied for city purposes. Its claim of ownership is based upon a sale made under a judgment in a suit brought by the city to enforce a city tax lien against the lot. The city became the purchaser at the sale, and the sale was confirmed by order of court. The city also obtained a quitclaim deed for the lot, executed by the several members of the board of county commissioners of Lincoln county. The said tax sale was made October 20, 1896; and the city at once went into possession and erected a building on the lot, which it used as a city council chamber and fire station, and it also let a portion of the lot to an-

other. The quitclaim deed from the county was made January 12, 1901—the same day the city claims to have redeemed from the taxes as aforesaid. It is appellant's position that neither the sale nor the commissioners' deed transferred any title to the city upon which it can base a right to redeem from his tax certificate and other taxes. It is contended that the tax suit was without any force since only a summary sale method was provided by statute at that time, and no suit was authorized. Section 880, Bal. Code, provided the method at that time for cities of the second class. The city of Sprague was a city of the third class, and the method of such a city was, by § 945, Bal. Code, made the same as that for cities of the second class as nearly as circumstances would permit. But the last named section further specifically states that the tax lien may be enforced by action in a court of competent jurisdiction, as well as by the summary sale method. This must be held to apply to cities of the third class, since the subject-matter of the whole section relates to cities of that rank. Why the additional method by action was not added to § 880, *supra*, as relating to cities of the second class, we do not understand, but there seems to be no doubt about its applicability in this instance to the city of Sprague. Section 955, Bal. Code, also states it as one of the duties of the city attorney of cities of the third class "to bring suit in the name of such city in the proper court for the collection of any tax." It seems that the city was left with the choice of remedies. She chose what is certainly recognized as the better remedy for the taxpayer, since it gave him an opportunity to appear and contest irregularities. The validity of a tax title founded upon a mere summary sale, without an opportunity for a day in court, has never been regarded with as much favor as that founded upon a de-

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cree of a competent court, which presumably has been rendered only after full inquiry into the regularity of the tax procedure. We observe from the record that the sale appears to have been made by the city attorney, and not by the sheriff. Section 945, *supra*, is silent upon that subject. Whether it was intended that such sale should be made by the sheriff, as in the case of other judgments, is not stated. The notice of sale, however, conformed to that provided for the summary sale method, except that it provided for the sale at the front door of the court house, and not in front of the city collector's office. The provision of § 880, *supra*, that sales should be made in front of the collector's office, relates to cities of the second class, which have an officer designated by that title; but cities of the third class have no officer so designated. It was therefore manifestly impossible to make the sale in front of such officer's place of business. The sale was at least a summary one, under the statute, with the added incident of a decree of a competent court directing it, although, as a judicial sale, it may have been irregular, if made by the wrong officer. The return states that a certificate of sale was issued to the purchaser in accordance with law. The certificate established the right to title, and the actual interest in the property was thereby created. *Diamond v. Turner*, 11 Wash. 189 (39 Pac. 379). We think the return of sale, as well as the judgment and confirmation of sale, and the entry into possession of the property by virtue thereof, together constituted evidence of the ownership of such an interest in the land, within the meaning of § 1752, Bal. Code, as entitled the city to redeem from appellant's certificate. Especially, it seems to us, it should be so held, since it appears that appellant all the time had knowledge of the city's possession and assertion of ownership. Ap-

pellant does not allege that he is a *bona fide* purchaser for value. He held only by the rights of a delinquent certificate holder and of a voluntary payer of other taxes. We think, within the principles discussed in *Bracka v. Fish*, 23 Wash. 646 (63 Pac. 561), appellant is not in position to say that the city, with its possession and interest aforesaid, has not sufficient title as against him to enable it to redeem. In view of the foregoing, we find it unnecessary to discuss the question of the county's deed to the city, and the alleged irregularities connected therewith.

Appellant insists that the county did not exact enough from the city when it redeemed. The county issued a certificate of redemption, purporting to be a receipt in full for all that was due under the various payments made by appellant prior to the time of redemption. It is a complete certificate of redemption upon its face, and we think appellant cannot litigate that matter here. The county has declared the property redeemed. It is not a party here. If a mistake has been made by the county, the litigation of that matter must be in an action where the question can be heard.

FULLERTON, C. J., and DUNBAR, and ANDERS, JJ.,
concur.

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31	554
37	403

[No. 4461. Decided April 10, 1908.]

CARL JOHNSON, *Appellant*, v. ANDERSON AND MIDDLETON
LUMBER COMPANY, *Respondent*.

MASTER AND SERVANT — UNSAFE PLACE TO WORK — PROMISE TO RE-
PAIR DEFECT — EXERCISE OF ORDINARY CARE BY SERVANT.

An employee who continues his work supported by the promise of the master to improve an unsafe place to work, and is

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injured by exposing himself indiscreetly to imminent peril in such unsafe place, cannot justify his own negligence as induced by a reliance on such promise to repair.

SAME — CONTRIBUTORY NEGLIGENCE.

A workman engaged in operating an edger which was not provided with a moving conveyor, as is customary, but with a stationary chute which occasionally became clogged and required clearing with a stick, cannot recover for injuries received in attempting to clear the chute in the dark, without stopping the machinery, when it appears that the place was dangerous for such work even in the light because of its cramped surroundings and the proximity of revolving shafts and saws.

Appeal from Superior Court, Chehalis County.—Hon. OLIVER V. LINN, Judge. Affirmed.

Sheeks & Hogan, for appellant.

J. B. Bridges, for respondent.

PER CURIAM.—Action for damages for personal injuries. The complaint alleges that plaintiff was operating for defendant an edger, which was defective, in that it was not provided with a moving conveyor, such as is usually used with such machines; that it was provided with only a stationary chute, into which sawdust, slabs, and other refuse from the mill fell, and that the only way of freeing the chute from such obstructions was to push out such refuse with a stick, which had to be inserted between and under the revolving saws; that the edger machine was not provided with sufficient light; that the plaintiff had called that fact to the attention of the foreman several times, and that said foreman had agreed to fix the electric light, which hung back of the edger, and put it in running order; that, while attempting to clear out the chute on the morning of February 5, 1900, by reason of the darkness and want of light above the edger machine, the stick which plaintiff was using for that purpose came in contact with a revolv-

ing shaft, throwing him upon the saws, with the result that his left arm was cut off between the elbow and the shoulder. The answer was, in effect, a charge of contributory negligence. At the close of plaintiff's testimony the court sustained defendant's motion for nonsuit upon the ground of contributory negligence and that the complaint did not state a cause of action. Judgment of dismissal followed, and from such judgment this appeal is taken.

A discussion of the testimony involves, in effect, a discussion of the complaint, as the testimony followed closely the allegations of the complaint. The testimony is very brief, and fails to show any substantial defect in the construction of the edger machine. In any event, appellant, who was a saw mill man of five years' experience, and who had been operating this particular edger between three and four weeks, knew of its plan of construction when he commenced to work. According to his testimony, his principal complaint was that the electric lamp, which furnished light at the back part of the edger, where he had to operate in clearing out the chute, had been allowed to get out of repair, and that the foreman had neglected to repair it, although his attention had been called to it several times, and he had agreed and promised to so repair it. Appellant attributes his misfortune to this circumstance, and relies upon the doctrine announced by this and many other courts, that, if the master promises to amend a defect, and by such promises induces a servant to remain at service, the fact of his continuing in the employment does not, as a matter of law, exonerate the master from liability, but simply furnishes a question of fact for the consideration of the jury. Conceding, as we do, the soundness of this doctrine, the employee, even supported by a promise to repair, is still expected to act with ordinary prudence and judg-

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ment. He may not act in an indiscreet manner, exposing himself to unnecessary and imminent peril, and justify himself upon the promise to repair. While we have held in some cases that the servant was not called upon to shut down a mill while arranging machinery, thereby causing a great loss of time to his master, that holding was in cases where the peril under the mode adopted was not imminent. But, yielding our heartiest support to the doctrine that the zeal of the servant exercised in the master's interest should not be counted against him in case of miscarriage of calculation, yet the zeal must be bounded by ordinary prudence and circumspection. In this case the appellant testifies that the clearing of the chute in the manner in which he was compelled to clear it was a dangerous operation at the best; that defendant was negligent by reason of the construction of the machine, which required it to be cleared in such a manner; that it required the utmost care and caution to perform the work; that it was much worse without a light, and that he told the foreman that it was too big a risk to work in a place like that without a light; that it was seven o'clock on the 5th day of February, and that it was "awful dark"; that they did not begin to see daylight in the mill at that time of the year until eight o'clock, and that the lamp in front did not furnish any light at the back part of the edger, being shut off by the frame; that it was so dark that he could not see the revolving shaft; that by reason of the darkness he got too near the shaft, and that that was the cause of the accident. We think, under the circumstances as stated by the appellant, that it was his plain duty to have stopped the running of the edger before attempting to clear out the chute in the dark, and that when it appears by a man's own statement that he attempted in the dark-

ness, in a cramped place, such as this was described to be, to work around and with revolving saws and shafts, there cannot be any difference of opinion in the minds of reasonable men as to whether or not he was guilty of contributory negligence. The negligence was so palpable that we think the court was justified in sustaining the motion for nonsuit.

Affirmed.

[No. 4505. Decided April 10, 1908.]

SULTAN WATER AND POWER COMPANY, *Respondent*, v.
WEYERHAUSER TIMBER COMPANY, *Appellant*.

APPEAL — REVIEW — NECESSITY OF MOTION FOR NEW TRIAL.

A motion for a new trial for alleged error of the court in refusing to allow the introduction of certain evidence is unnecessary as a preliminary to the review of such error on appeal.

EMINENT DOMAIN — APPROPRIATION OF LAND — MEASURE OF DAMAGES.

In condemnation proceedings to appropriate a right of way for ditch and flume purposes through defendant's land, the measure of defendant's damages would be the value of the land taken, together with the decrease in value of the balance of defendant's lands lying in one continuous tract adjacent to that taken, but not the injury to other tracts which merely have a common corner and are not otherwise part of a continuous tract.

SAME — RESULTING INJURY TO RIGHT OF NAVIGATION.

Where lands are appropriated for the purpose of constructing a dam across a navigable stream with one end resting on the lands sought to be appropriated, damages by reason of the obstruction of navigation would not be an element for consideration in the condemnation proceedings, but it would be necessary to litigate such damages in another action brought for the specific purpose.

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SAME — PUBLIC USE — EVIDENCE.

Where the court has already adjudged that the appropriation of land for the construction of a dam across a stream was for a public use, it was not error for it to exclude evidence to the effect that the appropriator had stated the water was to be used as a fish pond.

Appeal from Superior Court, Snohomish County.—
HON. JOHN C. DENNEY, Judge. Reversed.

Brownell & Coleman, for appellant.

A. R. Tilow and Bell & Austin, for respondent.

The opinion of the court was delivered by

MOUNT, J.—Respondent brought this action to condemn a right of way 100 feet wide for a ditch and flume across lots 8 and 14 in section 19, township 28 N., range 8 E., W. M., in Snohomish county, Wash., and for the erection of a dam across the Sultan river at a point on lot 8. The appellant is the owner of lots 1, 7, 8, and 14, and the east half of the southeast quarter of section 19, which is one body of land on the east bank of the Sultan river. It also owns large tracts of lands to the north and east of section 19. These lands are valuable for the timber standing thereon. The Sultan river is navigable for floating logs, shingle bolts, and wood down stream. The dam which respondent proposes to construct across the river is to be 50 feet wide at the base, 10 feet wide at the top, and 25 feet high. Respondent proposes to take out of the river at the dam 60 cubic feet of water per second of time. Upon the service and filing of the petition for condemnation the parties appeared, a hearing was had, and the court adjudged that the contemplated use of the premises sought to be appropriated was really a public use, and that the land and water claimed were required and neces-

sary for such use, and ordered a jury to assess the amount of damages to appellant. At the trial the jury awarded the appellant the sum of \$55, which amount is conceded to be sufficient for the land actually taken and for the damages to the land described in the petition. The errors alleged go to the refusal of the court to allow certain evidence offered by appellant.

Respondent moves to dismiss this appeal because no motion for a new trial was made by appellant. On questions of this character no motion for a new trial is necessary. *Carter v. Seattle*, 21 Wash. 585 (59 Pac. 500); Bal. Code, § 5056. The motion to dismiss is therefore denied.

The court at the trial limited the inquiry as to the damages to the lands actually taken and to the remainder of the lands described in the petition, which were lots 8 and 14 in section 19. The appellant offered to show that it was the owner of other lands adjacent to the tract described in the petition, and which will be damaged by increased expense in logging the timber therefrom by reason of the ditch and flume, and also by reason of the obstruction in the river. Five sections of these lands lie to the northwest of section 19, on the opposite shore of the river from the lands sought to be condemned. These sections are not adjoining, except that they corner together. They do not comprise a continuous tract, but lots 1 and 7 and the east half of the southeast quarter of section 19 are in one body with lots 8 and 14, described in the petition, and constitute an entire tract. We think the court erred in not permitting evidence by appellant to show what damage the construction of the ditch and flume would cause to the lands owned by appellant in one body in section 19. Section 16, art. 1, of the Constitution, pro-

vides: "No private property shall be taken or damaged for public or private use without just compensation having been first made." This court has held that the measure of damages in such cases is the value of the land taken, together with damages to the land not taken. *Seattle & M. Ry. Co. v. Roeder*, 30 Wash. 244 (70 Pac. 498). Where damages are allowed for part of a tract of land not taken, it sometimes becomes difficult to determine what is to be regarded as an entire tract. "In general, it is so much as belongs to the same proprietor as that taken, and as continuous with it, and used together for a common purpose." 2 Lewis, *Eminent Domain* (2d ed.), § 475. The lands in section 19 belonging to appellant are one continuous tract. Lots 8 and 14 are fractional parts of the section designated as lots. Respondent could not limit the damages by describing in his petition only a part of the tract of land. If the ditch and flume make logging operations on this piece of land more difficult or expensive, and thereby render the land with the timber on it less valuable, this may be shown to increase the damages.

In regard to the other sections of land, the court, we think, properly rejected evidence as to damages thereto, because they are not adjacent to section 19, and are contiguous only by reason of the fact that section 17 has a common corner with section 19. Other sections likewise corner with each other at a common point. These lands are on the opposite side of the river from the lands through which the ditch and flume run, and are from one to five miles distant from the proposed improvement. If they shall be damaged at all, it is by reason of the dam across the Sultan river, which may become an obstruction to the logs floated down, and not by reason of the right of way condemned across other lands of appellant, or of any im-

provement upon appellant's lands. It is conceded in the case that respondent has a right to build the dam, and that one end of it only will rest upon the part of section 19 owned by appellant. Appellant also conceded that the river is navigable only for floating logs down stream. Whether the dam across the river will injure the lands of appellant located above it will depend upon whether or not it is an obstruction to such navigation. If the dam should be constructed or maintained in such manner as to prohibit navigation, then appellant, or any person injured thereby, may require the removal of such obstruction, and recover his damages. *Carl v. West Aberdeen Land & Imp. Co.*, 13 Wash. 616 (43 Pac. 890); Gould, Waters (3d ed.), § 110. If respondent has a right to build the dam across the river, if he proposed to do it in a lawful manner, so as not to prohibit navigation, and so that each end would rest on his own land, and no injury were done by reason of flooding upper lands, certainly no one could complain. It would not be necessary, in such event, for respondent to litigate in advance any injury which might be claimed by upper proprietors by reason of the increased cost in navigating the river. The fact that respondent proposes to erect a dam with one end thereof upon a piece of appellant's land, which is being condemned for the purpose, does not require respondent to litigate in such condemnation proceedings damages which may be claimed by appellant, or others who may own lands above, for an obstruction to navigation of the river. The right to the navigation of the river is a right common to the public. It is not a part of the land of appellant, and not an incident or appurtenance thereto, and therefore appellant cannot recover for an obstruction to the navigation of the river until he has suffered an

injury. The argument is made that on appellant's lands are large bodies of timber, which can be more cheaply taken to market down the Sultan river than any other way, and that the construction of this dam will add a dollar per thousand feet to the cost of marketing this timber, resulting in a loss of something like \$80,000 to appellant. Conceding these facts to be true, they afford no reason for litigating that question of damages in this proceeding, because these damages do not flow from the taking or damaging of appellant's lands. They flow from the obstruction of a highway, which appellant and all others who will be damaged in the same way, if at all, are privileged to use. If appellant owned no lands, but was engaged in logging, buying, and floating logs down the Sultan river from above this dam to the market, it would be injured in the same way, and probably to the same extent, as it now claims it will be injured. Yet under such circumstances no one would claim that appellant would be a necessary, or even a proper, party to an action to condemn lands on which to build a dam across the river. Nor would it be necessary that damages be assessed and paid to appellant before respondent could build the dam. An adjudication of damages in this case will not be an adjudication of injuries which may arise in regard to the navigation of the river.

Appellant also complains because the court refused to permit questions as to the use of the water for a fish pond. He was permitted to ask the president of the respondent company if the water was for use for that purpose, and the answer was in the negative. The witness was then asked if he had not stated to other persons that the water was to be put to such use. We think this

evidence was properly excluded, for the reason that the court had already adjudged what the use was for.

For the error above discussed, the cause is reversed for further proceedings.

FULLERTON, C. J., and HADLEY, DUNBAR, and ANDERS, JJ., concur.

[No. 4388. Decided April 11, 1903.]

THE STATE OF WASHINGTON *on the Relation of George G. Quincy, Appellant*, v. U. L. COLLINS, *as Clerk of the Superior Court of Snohomish County, Respondent*.

CLERK'S FEES — COLLECTIBLE ON MOTION TO REVIVE JUDGMENT.

A motion to revive a judgment is in the nature of a new suit, for which the clerk is entitled to charge the fees provided by Laws 1893, p. 421, § 1, for the commencement of actions, even though all fees have been paid in full in the action in which the original judgment was rendered.

Appeal from Superior Court, Snohomish County.—Hon. JOHN C. DENNEY, Judge. Affirmed.

Austin & Bell and Million & Houser, for appellant.

H. D. Cooley, for respondent.

PER CURIAM.—This is an appeal from a judgment refusing relator a mandamus to compel the respondent, as clerk of the superior court of Snohomish county, to file a motion to revive a judgment, and issue a citation on said motion. Relator ordered a judgment entered in the superior court of Snohomish county on the 18th day of March, 1897, in an action begun in the year 1896. At the time of rendering said judgment, relator paid the fees

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required by law in such cases. The five years having run, on the 1st day of April, 1902, the relator presented to respondent, as such clerk, his motion to revive and continue the lien of said judgment, with leave to issue execution. At the time of the presentation of the motion the relator presented to respondent, as such clerk, the form of notice or citation ready for signing, and requested that respondent, as such clerk, file said motion and issue said notice or citation. This the respondent refused to do unless and until relator should pay him as fee therefor \$1. The relator refused to pay the fee demanded, and brought this action to compel the respondent to file said motion and issue said notice without the payment of said fee. The writ was denied by the lower court, and the case is brought here on appeal.

Section 1, Laws 1893, p. 421, provides a list of fees to be charged by the clerk of the superior court. But it is contended by the appellant that no fee is provided in this act in actions for reviving judgments, because it is provided in § 2 of said act that the fees prescribed in that section shall be in full for all services performed by the clerk of the superior court in the progress of civil actions and proceedings, other than in probate cases, from the beginning thereof down to and including the entry, collection, and satisfaction of final judgment therein, and including all proceedings in open court, and all entries, filings, and recording therein, except for the recording and transcribing for which special fees are prescribed in these sections. As a matter of first impression, we conclude that this provision was intended to apply only to services rendered by the clerk during the life of the judgment, and to the ordinary processes of collection and satisfaction, and not to another action for the reviving of the

judgment. But in addition to this, the status of an expired judgment was defined by this court in *Brier v. Traders' National Bank*, 24 Wash. 695 (64 Pac. 831), where it was held that the lien of the judgment expires at the end of five years from the rendering thereof, and it was said that "the proceedings to revive a judgment are analogous to complaint, answer, and reply in an ordinary action at law. The same formalities that are necessary for bringing the suit prevail. It is in all respects as much a new suit as if it was a common-law action on the judgment." No error was committed by the court in refusing the writ.

It is suggested by respondent that the clerk was entitled to demand a fee of \$4, instead of \$1, for the services required. But that is a question which is not presented by the appeal.

The judgment is affirmed.

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[No. 4848. Decided April 14, 1903.]

J. P. LACAFF, *Respondent*, v. DUTCH MILLER MINING
AND SMELTING COMPANY, *Appellant*.

APPEAL — SUPERSEDEAS BOND — STAYING COSTS.

Where the judgment was for costs, and also for other relief, a supersedeas bond which is in double the amount of the costs and \$200 additional is sufficient to operate as a supersedeas upon the judgment for costs and as an appeal bond, and therefore give the supreme court jurisdiction, although not sufficient to operate as a supersedeas on other parts of the judgment.

TRANSFER OF STOCK — ACTION AGAINST CORPORATION — SUFFICIENCY OF COMPLAINT.

An action by an assignee of shares of stock, which had been subscribed for by his assignor, to compel the corporation to issue

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them to plaintiff does not state a cause of action when it fails to allege a transfer of the stock upon the books of the company or facts showing the duty of the company to enter the transfer, since it is provided in Bal. Code, § 4261, that such transfers shall not be valid, except between the parties thereto, until the same shall have been entered upon the books of the company.

Appeal from Superior Court, Kittitas County.—Hon. FRANK H. RUDKIN, Judge. Reversed.

George D. Farwell, for appellant.

E. E. Wager and *C. R. Hovey*, for respondent.

The opinion of the court was delivered by

MOUNT, J.—This action was brought in the lower court by respondent against appellant to require appellant to issue to respondent certificates for 166,666 shares of stock of appellant corporation, and for other relief. The summons and complaint were regularly served on the defendant corporation on November 9, 1901. The summons required defendant to appear within twenty days thereafter and defend the action. On the 29th day of November, 1901, which was the last day for defendant to appear and defend the action, it served a demand upon plaintiff's attorneys, requiring them to furnish to defendant a certified copy of an assignment referred to in the complaint. On the next day a copy of this demand was filed in the clerk's office. The plaintiff did not comply with this demand, but on December 3, 1901, filed a motion for default and judgment, and on the 6th served the motion for default and judgment upon defendant's attorneys. Thereafter, on the next day, December 7th, defendant filed a demurrer to the complaint, and also a motion to dismiss the motion for default. Plaintiff's motion for default came on regularly for hearing on January 2, 1902, both plaintiff and defendant being present; and the court,

after hearing arguments of counsel, granted the motion, and entered judgment for default as prayed for in the complaint. Thereafter, on January 7, 1902, the defendant filed a motion, supported by affidavits, to vacate the judgment and default, and for leave to plead to the merits. This motion, upon a hearing, was denied on January 16, 1902, and an exception saved by defendant. On February 24, 1902, defendant filed another motion, denominated "An Amended and Supplemental Motion and Motion for Rehearing to Set Aside and Vacate Default and Judgment." This motion was supported by affidavits, and was heard by the court and denied on March 24, 1902. The defendant now appeals from the judgment by default, and the order denying the first motion to set aside the default and judgment, and from the order denying the last motion.

The respondent moves to dismiss this appeal because the bond on appeal is for \$300, conditioned both as an appeal and as a supersedeas bond. The judgment is a money judgment for costs, and also a judgment for other relief. The court was not asked to fix, and did not fix, the amount of a bond to be given by appellant as a supersedeas of that part of the judgment which was for relief other than money. The bond given was for \$300—\$200 for an appeal bond, and \$100 additional—being double the judgment for costs. This bond operated as a supersedeas upon the judgment for costs and as an appeal bond. It did not operate as a supersedeas upon the other parts of the judgment, and was not intended to do so. We think this bond was sufficient, under the statute, to give this court jurisdiction, and the motion is therefore denied.

The statement of facts upon the hearing of the motion for default, and upon the first motion to set aside the de-

fault and judgment, is not before us on this appeal, because the same was not filed in time. *State ex rel. Dutch Miller, etc., Co. v. Superior Court*, 30 Wash. 43 (70 Pac. 102). For this reason, there are but two questions for us to consider: (1) Does the complaint state facts sufficient to constitute a cause of action? (2) Did the court err in denying the last motion to set aside the default?

The complaint, after alleging the corporate character of the defendant, is as follows:

"(2) That on January 31, 1898, one Marcus Bertram subscribed for, and paid for in full, 333,333 1-3 shares of the capital stock of the said defendant; that no certificates for the said shares of stock were issued to the said Marcus Bertram. (3) That on February 8, 1898, the said Marcus Bertram, for value, duly sold, assigned, transferred, and set over, in writing, one-half of the aforesaid shares of stock to which he was entitled as aforesaid, unto the plaintiff herein, who is now the owner and entitled to the possession of the same. (4) That plaintiff has demanded of the defendant that it issue to him the certificates for the shares of stock in the defendant corporation to which he is entitled as aforesaid, but that the defendant fails and refuses so to do, and the defendant further refuses to recognize the plaintiff as one of its stockholders, and to permit the plaintiff to inspect the books of the defendant corporation. (5) That plaintiff is without any plain, speedy, or adequate remedy at law.

"Wherefore plaintiff prays the following: (1) That a decree be entered adjudging the plaintiff to be the owner and entitled to the immediate possession of 166,666 2-3 shares of the capital stock of the defendant corporation, and requiring the defendant to at once issue to the plaintiff a certificate for the said shares, and further requiring the defendant and its officers to permit the plaintiff to inspect the books of said corporation, and to fully recognize and acknowledge the plaintiff's rights as a stockholder in said corporation; (2) for judgment against the defendant for

his costs of suit; (3) and for such other and further relief as to the court may seem meet and equitable.”

The complaint shows that Marcus Bertram subscribed and fully paid for 333,333 1-3 shares of the capital stock of the corporation. He was therefore a stockholder in the corporation, and entitled to a certificate for these shares, as prescribed by the by-laws of the company, which certificate was negotiable in the sense that it might be sold, and the interest of the owner of the shares transferred to another, upon compliance with certain conditions usually provided in the by-laws of the corporation. The complaint further shows that no certificate for the said shares was issued to the said Marcus Bertram. If Marcus Bertram was entitled to certificates after he had paid for the shares, and the company had refused to issue the same to him, the general rule, as stated by many decisions and text-writers, is that an action in equity may be maintained by a stockholder to compel the corporation to transfer or issue certificates of the stock of the corporation to the rightful owner. Mr. Cook, in his work on Stocks, etc. (3d ed.), at § 61, says:

“The corporation is bound, upon demand, to deliver to a stockholder a certificate of stock representing his interest in the corporation. If it refuses to issue the certificate, the stockholder may bring suit in equity to compel its issuance.”

Under the head “Rights and Duties of the Corporation in Allowing or Refusing Registry,” the same author, at § 389, says:

“Where, for any reason, the corporation refuses to allow the registry of a transfer of stock, when it is the duty and obligation of the corporation to allow it, the transferror or the transferee who applies for registry may, in general, pursue one of three remedies”—one of which is a suit

in equity to compel the corporation to register a transfer of the stock. It is also held that an injured person may resort to the legal or equitable remedy at his election. 20 Enc. Pl. & Pr. p. 814; *State ex rel. Bross v. Carpenter*, 51 Ohio St. 83 (37 N. E. 261, 46 Am. St. Rep. 556); *Withers v. Lafayette County Bank*, 67 Mo. App. 115; *Keller v. Eureka Brick Machine Mfg. Co.*, 43 Mo. App. 84 (11 L. R. A. 472); *Baker v. Wasson*, 59 Tex. 1. See, also, *McAllister v. Kuhn*, 96 U.S. 87; *Payne v. Elliot*, 54 Cal. 339 (35 Am. Rep. 80). In *Huggins v. Milwaukee Brewing Co.*, 10 Wash. 579 (39 Pac. 152), in commenting upon the rule that an action will lie for a conversion where there is demand and refusal to transfer stock, this court, at page 582, said:

"Whether a rule giving to stockholders in a corporation such a privilege would have to be upheld in this state, we need not now decide. But granting that it is a rule so firmly established in the law that its enforcement could be justly required under our statutes governing corporations, we are strongly convinced that it is a harsh and dangerous rule, the application of which ought not to be extended beyond those cases where there is a clear legal right on the part of the assignee of stock certificates to have a transfer."

The section of the statute which the court had in mind when this statement was made is § 4261, Bal. Code, which is as follows:

"The stock of the company shall be deemed personal estate, and shall be transferable in such manner as shall be prescribed by the by-laws of the company; but no transfer shall be valid except between the parties thereto, until the same shall have been entered upon the books of the company, so as to show the names of the parties, by and to whom transferred, the numbers and designation of the shares, and the date of the transfer."

This statute was, no doubt, intended to relieve a corporation from any liability whatever on account of the trans-

fer of any of its shares of stock until it had had notice of the transfer, and had entered the same upon the books of the company. It, in effect, declares that all transfers of stock of the corporation are invalid, as between the company and the transferee, until such transfer shall have been entered upon the books of the company. If the transfer is invalid as between such transferee and the company, the transferee certainly cannot enforce such transfer against the company. Until the transfer is entered upon the books of the company there is no privity of contract existing between the transferee and the corporation which can be enforced by one against the other. There can be no doubt that if Bertram had subscribed and fully paid for 333,333 1-3 shares of the capital stock of the company, and was the owner thereof and entitled to certificates therefor at the time he is alleged to have sold a part thereof, he could, by equitable assignment, transfer all his right to the whole or any part of the shares subject to all the rights of the corporation, of which the purchaser was bound to take notice. But before his transferees could compel the issuance of certificates for the stock, they must allege either an entry of the transfer upon the books of the company, or a duty of the company to make it. To show the latter, it is necessary to allege the rule prescribed in the by-laws of the company for the transfer of the stock, and a compliance with all the reasonable conditions thereof, and that the corporation had no rightful claim to the stock, or a lien thereon, so as to make clear the legal duty of the company to make the entry of the transfer upon the books of the company and to issue the certificate. *Lowell, Transfer of Stock*, § 89 *et seq.*; *Burrall v. Bushwick R. R. Co.*, 75 N. Y. 211; *Union Bank v. Laird*, 2 Wheat. 390. Until there was a transfer of the stock upon the books of the

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company, or a duty to make it, the respondent, under the provisions of the statute above quoted, could claim no relief against the company for the issuance of certificates. There is no allegation of either in the complaint. For this reason the complaint fails to state a cause of action.

Under this view of the case, it is unnecessary to consider the other question.

The cause is reversed and remanded, with leave to respondent to amend his complaint within thirty days after the remittitur is filed below, if he so desires.

ANDERS and DUNBAR, JJ., concur.

FULLERTON, C. J., concurs in the result.

[No. 4367. Decided April 14, 1903.]

ALICE MCBRIDE, *Appellant*, v. JOHN MCGINLEY, *Respondent*.

DEFAULT JUDGMENT — VACATION — DISCRETION OF COURT.

The vacation of a default judgment upon a showing by the party defaulted that he relied on a settlement with plaintiff made out of court is a matter properly within the discretion of the trial court.

WORK AND LABOR — SERVICES BY MEMBER OF FAMILY — CONTRACT FOR REMUNERATION — SUFFICIENCY OF EVIDENCE.

In an action by a sister to recover the value of services as housekeeper for a brother during a period of nine years, it was not error to direct a verdict for defendant, where it appeared that plaintiff, after the death of her husband, came with her daughter to live at the home of her brother and keep house for him, there being no agreement or understanding as to any charge for services, and nothing in the conduct of the parties to imply a contract other than one for maintenance.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

James Hopkins, for appellant.

P. F. Quinn, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The complaint in this action, omitting the formal parts, is as follows:

“1. The plaintiff alleges that in the month of April, 1892, she commenced work for the defendant, at his instance and request as housekeeper and continued in his employment for the period of nine years, for which the defendant promised to pay her, on demand, such sum as they were reasonably worth.

2. That such services were reasonably worth the sum of twenty-two hundred dollars and on the 4th day of October, 1901, the plaintiff demanded of the defendant payment of said sum.

3. That no part of the same has been paid except the sum of two hundred dollars, and that there is now due from the defendant to the plaintiff thereon the sum of two thousand dollars with interest from May 1, 1901.

Wherefore plaintiff prays judgment against the defendant for two thousand dollars, together with interest and costs.”

The defendant not answering within the time required by law, a default judgment was taken against him. Subsequently, the default judgment was vacated on an application supported by affidavits showing that defendant had not answered because he relied upon a settlement made with plaintiff after the commencement of the action, wherein, for the sum of \$300 paid to the plaintiff, she waived further demand, and agreed to dismiss the action. The vacation of the judgment is the first error assigned by the appellant. But we think, in consideration of the facts shown by the affidavits, which are not disputed, that the court did not abuse its discretion in vacating the judg-

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ment. The defendant answered, denying generally every allegation of the complaint, and alleging affirmatively that in July, 1891, he was informed by the plaintiff, who was then living in Philadelphia, that her husband had died, and she was in straitened circumstances; that she requested him to send her money, and that in response he did send her \$50, and offered to make provision for herself and child, a daughter about eleven years old; that the plaintiff afterwards informed him that, if he would forward her the necessary money to defray the expenses of herself and child from her home in Pennsylvania, she would come to the state of Washington, and live with him, and take care of him and his household; that she subsequently did come under such arrangement, with her child, and that since said time he had supported and cared for plaintiff and her child at a cost to him of \$2,455.85; that in the year 1900 the plaintiff decided to quit his residence, whereupon he gave her the sum of \$200; that subsequently, and after the bringing of the action by plaintiff, he had a settlement with her, wherein she accepted the sum of \$300 in full satisfaction of all claims against him, and agreed to the dismissal of the case without costs to him. Upon these issues the case went to trial, and, after the introduction of plaintiff's evidence, the court entertained a motion to direct a verdict for the defendant. Judgment was entered in accordance with the motion, and from that judgment this appeal is prosecuted. The second and only other assignment is that the court erred in directing a verdict for the defendant.

The following is all of the direct testimony of the plaintiff:

"Q. Mrs. McBride, you are the plaintiff in this case, are you not; the party bringing this action against the

defendant, Mr. McGinley? A. Yes, sir. Q. State Mrs. McBride—tell those gentlemen there how you happened to come to Mr. McGinley's place; tell what transpired to bring you to the farm. A. Well, he sent the money for me to come. Q. Where were you living when he sent you that money? A. In Philadelphia. Q. What did he say with reference to providing you with a home? A. Well, he said he thought it was better that we should come to him than stay there alone. Q. Did he write to you with reference to coming just prior to the death of your husband? A. Yes, sir. Q. Now, do you remember what he wrote at that time? (Objection. Sustained.) Q. Well, what time did you come to reside at his place; what time did you come to the McGinley ranch? A. In 1892, I guess. Q. In 1892—what time of the year? A. It was in the spring, along in April. Q. How long did you remain there? A. Remained there nine years. Q. Now, tell these gentlemen what you received for that service prior to leaving the place? A. I didn't come for service; I came to stay with him all the rest of my days. Q. Now, then, how did you happen to leave. A. I happened to leave because I had to leave. Q. Tell the jury. A. Well, he gave me \$200 and told me to go wherever I liked now. Q. Did you have any talk prior to that time? A. I never had a word with him. Q. When was this he gave you \$200 and told you to go? A. In May, I think. Q. In 1901? A. Yes, sir. Q. What were your duties while you remained on the farm, Mrs. McBride? A. Oh, just housekeeping. Q. You had some cows? A. Yes, sir. Q. Some chickens too, and had butter and eggs to sell? A. Yes, sir. Q. Who took care of the cows and chickens and made the butter? A. There was only the three of us, and we all took care of them. Q. Where did the proceeds—the money go? A. Oh, it went for the needs of the house and clothes for us; if any went to loss I don't know of it. Q. Now, prior to the time he handed you this \$200 and told you to go, how much had he paid you from the time you came to live on his place? A. I never received any money; he never paid anything

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but the \$200. Oh, yes, he did; I received \$5 one time. Q. During that time did he buy your clothes A. He didn't have to buy them; he allowed ourselves to buy whatever we got; he didn't care."

The cross-examination did not tend in any way to strengthen her case, and there was no other testimony pertinent to the main issue. So that it can be clearly seen that there was no testimony tending in the slightest degree to support the allegations of the complaint in relation to the contract pleaded therein. On the contrary, it affirmatively appears from the plaintiff's testimony that from the time she came to live with her brother up to the time she left there was no intention on her part to make any charge for services rendered; but that, if there was any contract, it was a contract for maintenance, and that she had received. There being no testimony which would support a verdict, no error was committed in instructing a verdict for defendant.

Affirmed.

FULLERTON, C. J., and ANDERS and MOUNT, JJ.,
concur.

[No. 4398. Decided April 18, 1903.]

SIDNEY NORMAN, *Respondent*, v. WESTERN UNION TELE-
GRAPH COMPANY, *Appellant*.

TELEGRAPH COMPANIES — LIABILITY FOR MISTAKE IN TELEPHONING
MESSAGE — WHEN MESSENGER AGENT OF ADDRESSEE.

Where the person to whom a telegraph message was sent asked the messenger of the company to telephone him the contents of the telegram because he was outside of the free delivery district, he thereby constituted such messenger his own agent, and a mistake by the messenger in transmitting the contents of

the telegram could not be chargeable against the company on the theory of ratification of his acts from the fact of his being in their employ and using a telephone in their office to repeat the message, with the knowledge of the telegraph operator, when there is nothing to show that the operator heard the message read over the telephone, or knew that a mistake had been made.

SAME—DELIVERY OF MESSAGE—SUFFICIENCY.

Any delivery of a telegraph message which, in law, would be good as between the receiver of the message and the company is good as between the sender and the company.

SAME—EVIDENCE—QUESTION FOR JURY.

Where a principal has testified that he does not remember having authorized his agent to send a certain telegram, but the agent testifies positively that he was so authorized, there is no such substantial conflict as to require the submission of the question to the jury.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Reversed.

Forster & Wakefield and *George H. Feron*s, for appellant.

Winston & Winston, for respondent.

The opinion of the court was delivered by

FULLERTON, C. J.—This is an action for negligence brought by the respondent against the appellant. At the time of the occurrence of the transaction out of which the cause of action arises, the respondent was a broker residing in Spokane, in this state, and made it a part of his general business to buy and sell mining stocks. On February 11, 1899, finding where he could place some shares of stock of the Noble Five Consolidated Mining and Milling Company, he sought to purchase the same from one Burke Corbet, who then resided at Grand Forks, in the state of North Dakota. The correspondence between them was principally by telegraph, and it was from the trans-

mission and delivery of certain of the messages that passed between them that the claim of negligence arises. The principal facts relating to the transmission and delivery of the several messages were set forth in written stipulations entered into by the parties,—one introduced by the respondent and one by the appellant. The stipulation introduced by the respondent was as follows:

"It is hereby stipulated by and between the parties hereto as follows, to-wit:

"That between the 11th and 17th days of February, 1899, plaintiff delivered to the agent of defendant at Spokane, Washington, certain written messages for transmission over the lines of defendant to one Burke Corbet, at the City of Grand Forks, North Dakota, and received from the said agent certain written replies thereto, purporting to have been sent by said Corbet from said City of Grand Forks, North Dakota, which messages and replies were in words, letters and figures, as follows, to-wit:

"1st. 'Spokane, Wash., Feb. 11, 1899. To Burke Corbet, Grand Forks, N. D. Can you sell us five thousand Noble Five at twenty-four or better? Answer quick. S. Norman & Co.'

"2nd. 'Grand Forks, No. Dak., 2, 11, 1899. To S. Norman & Co. Spokane, Wash. Yes. Burke Corbet.'

"3rd. 'Spokane, Wash., Feby. 11, 1899. To Burke Corbet, Grand Forks, N. D. Forward immediately with draft attached. Will take some more. Will you sell? S. Norman & Co.'

"4th. 'Grand Forks, N. D., Feb. 11, 1899. To S. Norman & Co., Spokane, Wash. Yes. Burke Corbet.'

"5th. 'Spokane, Wash., Feby. 11, 1899. To Burke Corbet, Grand Forks, N. D. Send five thousand with draft attached and five thousand three days sight. Will place much more. Wire fully how much you will sell S. Norman & Co.'

"6th. 'Spokane, Wash., Feby. 13, 1899. To Burke Corbet, Grand Forks, N. D. We wired you this morning saying we would take five or ten thousand more Noble

Five at the same price. Message sent by mistake of Western Union to Grand Forks, B. C. Can probably place twenty thousand besides the ten already bought. S. Norman & Co.'

"7th. 'Grand Forks, N. D., 2, 14, 1899. To S. Norman & Company, Spokane, Wash. Wrote you fully yesterday, which answers all inquiries. Burke Corbet.'

"8th. 'Spokane, Wash. Feby. 17, 1899. To Burke Corbet, Grand Forks, N. D. Have not received stock or letter. When were they mailed? S. Norman & Co.'

"9th. 'Grand Forks, N. D. 2, 17, 1899. To S. Norman & Co., Spokane, Wash. On the thirteenth, about five P. M. Burke Corbet.'

"That messages one, three and five were properly transmitted from Spokane to Grand Forks, and were at the request of said Corbet telephoned to his residence on Saturday evening, February 11, 1899, by one A. Kjørlien, a messenger in the employment of defendant at Grand Forks; that the written messages were not delivered to said Corbet until the Monday, February 13, 1899.

"That it is not intended by this stipulation to agree that said message one was telephoned by said Kjørlein either correctly or incorrectly.

"That said messages two and four were written by said Kjørlein and by him delivered to the operator at Grand Forks for transmission. That said Corbet authorized the sending of message No. two.

"That it is not intended to agree whether or not said Corbet authorized the sending of message No. four, but that was written by said Kjørlein under a purported authorization of said Corbet.'

The one introduced by the appellant was as follows:

"It is hereby stipulated between the plaintiff and the defendant that A. Kjørlein was a messenger employed by the defendant at Grand Forks, North Dakota, during the year 1899, between the 1st and 28th days of February of said year, and at the time of the telegraphic correspondence between the plaintiff and one Burke Corbet referred to;

that the said Corbet resided out of the free delivery district described in the contract upon which the message was sent. And the several messages were delivered to the said Corbet, at his special instance and request, by the said messenger Kjorlein by telephone, and were afterwards sent as directed by said Corbet to his address within the free delivery limits of the office at Grand Forks. That the said messenger Kjorlein was not authorized to telephone said messages by the defendant, or otherwise than by the direction of the said Corbet.

"It is further stipulated that the said Burke Corbet resided more than one (1) mile from the office of the Western Union Telegraph Company in Grand Forks, and that the free delivery limits in said Grand Forks was one-half ($\frac{1}{2}$) mile. That the message described in the evidence and pleadings as Number One was received at about the hour of — P. M. on the 11th day of February, 1899, and that it was a cold, stormy night, and the said messenger Kjorlein called up Mr. Corbet by telephone, as he had been requested to do, and informed him that he had a telegram for him, and that thereupon Corbet instructed him to 'phone it to him; and that on the next day, which was Sunday, he would call at the Telegraph Company's office for the original. That said Corbet did not call at the company's office during office hours of said Sunday, but did on said Monday morning receive the original of said message."

After the date of the receipt of message numbered four, and before the receipt of that numbered seven, as numbered in the first stipulation quoted, the respondent contracted to sell ten thousand shares of stock of the Noble Five Consolidated Mining & Milling Company; assuming that he had a contract of purchase for that amount with Corbet. The letter of Corbet mentioned in message number seven informed him that a mistake had been made in the delivery of the first message; that it had been telephoned him as reading "forty-four or better," instead of

"twenty-four or better," and that he had directed that it be answered "Yes" believing that the price offered was forty-four—further stating that he would not sell the stock at the price named, nor for any less sum than forty cents per share. The respondent, in order to fulfill his contract, was forced to go into the open market and buy the stock, which he did at a loss to himself of \$625, and it is for this sum that he brought this action. The cause was tried before the court and a jury, resulting in a verdict and judgment for the amount claimed.

While many errors have been assigned, all of which have been more or less elaborately argued, the only assignment we have found it necessary to notice is the one which questions the sufficiency of the evidence to justify the verdict. The trial court instructed the jury that the effect of the facts recited in the stipulation entered into between the parties was to make the messenger boy the agent of Corbet, and that in telephoning the messages to Corbet, he was acting as the agent of Corbet, and not as the agent of the telegraph company. The court, however, assumed that there was some evidence in the record tending to show an adoption or ratification of the acts of the messenger boy on the part of the company, which would render it liable if the jury found it to be true, and gave them in this connection this further instruction:

"But if you should find from the evidence that although Kjorlein acted without authority in telephoning said messages to Corbet and receiving any answers from him, the defendant, knowing all that said Kjorlein did in that respect, adopted and acted upon the said acts of said Kjorlein, then the defendant would thereby assume all the responsibility therefor, the same as if said Kjorlein had been theretofore authorized by said defendant."

The evidence thought to sustain this, as pointed out by the respondent, is found in the testimony of the messenger. He testified that the telephone which he used when telephoning the messages to Corbet was in the company's office, and that the telegraph operator knew that he had telephoned the messages. But it seems to us that there is nothing in this that would render the company liable for a mistake of the messenger, on the principle of adoption or ratification of his acts. If the messenger was acting as the agent of Corbet, he was Corbet, in so far as the company was concerned, and his mistake was Corbet's mistake—just as much so as it would have been had Corbet received the message personally, and misread it himself. Certainly, had the latter been the case, there would have been no contention that the company would have been liable to the respondent for sending the answers it did under Corbet's directions, even had it known that Corbet had misread the message, and was answering unadvisedly. It would seem that its liability would not be different had it sent the message with knowledge that a mistake had been made by the agent, but even that is not a material question here. The messenger does not pretend that the operator heard him read the message, or that the operator knew that a mistake had been made; nor is there anything elsewhere in the record that tends to show that he did. On any theory, therefore, there was no evidence of ratification or adoption on which the company could be held liable.

The respondent further contends that, although there was a sufficient delivery of the message as to Corbet, there was no sufficient delivery as to him; that he had a right to assume there had been an actual copy of the written message handed to Corbet; and that the company is liable to him for any loss he has suffered because of its failure

to hand him such a copy. But the company's undertaking, as implied from its acceptance of the message for transmission, was not that it would make an actual delivery of it to Corbet in person, but was, rather, that it would make such a delivery as would constitute a delivery in law; hence, when it showed that it had delivered the message to the person whom Corbet had authorized to receive it, it had complied with its undertaking. Stated in another way, any delivery of a message which, in law, would be good as between the receiver of the message and the company is good as between the sender and the company. Doubtless the sender of a message can contract for a personal delivery of a message, in which case a delivery to an agent would not be sufficient, but no such contract is implied from the mere act of delivery of a message to the office of the company, to be transmitted in accordance with its usual regulations. The sender of the message loses no legal rights by reason of this rule. If the receiver makes a mistake through his agent, which causes loss to the sender, he is just as much responsible for that loss as he would have been had he made the mistake personally.

Lastly, it is said there was no authorization for the fourth message, and that the company is liable for that part of the injury which arose from its receipt by the respondent. We fail, however, to find any evidence to the effect that the message was not authorized. Corbet does not say that it was not, all he says is that he does not remember of having authorized it. While, on the other hand, the testimony of the messenger is positive to the effect that he did authorize it. It would seem that there was here no such substantial conflict as to require the submission of the question to the jury.

Concluding, as we do, that there is no evidence of negligence on the part of the appellant, the judgment appealed

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Syllabus.

from will be reversed, and the cause remanded, with instructions to dismiss the action at the respondent's costs, and it is so ordered.

ANDERS, MOUNT and DUNBAR, JJ., concur.

[No. 4479. Decided April 18, 1903.]

31	585
35	552

S. W. McDANNALD, *Respondent*, v. WASHINGTON AND
COLUMBIA RIVER RAILWAY COMPANY, *Appellant*.

NEGLIGENCE — INJURIES TO SERVANT — DANGEROUS APPLIANCES —
QUESTION FOR JURY.

The question of a railway company's negligence in erecting and maintaining cattle guards in close proximity to its tracks is one for the jury, where it appears that a trainman was injured by striking against one while attempting to board a car; that the guard was within about eighty-five feet of a customary stopping place, which required the trainmen to get off the cars in the discharge of their duties; and that the cattle guard posts were within twelve or fourteen inches of the cars at that point, while there appeared to be no necessity for such close location, and in fact at other points along the road such posts were located farther from the track.

SAME — ASSUMPTION OF RISK — CONTRIBUTORY NEGLIGENCE.

The questions of plaintiff's contributory negligence and assumption of risks are for the jury, where it appears that he was the conductor of a freight train; that, after stopping at a station, the train was slowly starting up again, and that plaintiff, in order to board it, ran to a road crossing and caught hold of the hand rail on the caboose; that at the moment his attention was called to an intending passenger running toward the train and his foot slipped off the car step and he was thrown against a cattle guard located about twenty-five feet beyond the point where he started to board the train; that he could have seen the cattle guard, if his attention had been called to it; that he did not know of its dangerous position in relation to the track; and that the posts of the cattle guard were much closer to the track than in his experience such posts were usually located, and were closer than any others along defendant's line of railway.

APPEAL — HARMLESS ERROR — REFUSAL TO STRIKE IRRESPONSIVE ANSWER — CURED BY INSTRUCTIONS.

The refusal of the court to strike an answer that was not responsive was not prejudicial error, where the court subsequently told the jury they could not consider evidence of that character.

SAME — INSTRUCTIONS NOT WITHIN ISSUES.

The modification by the court of a requested instruction stating a general rule of law by adding thereto an exception to the general rule would not be prejudicial, although not within the issues of the case, when the adverse party did not claim recovery by reason of the exception and there was evidently no intention of the court to apply the exception to the case on trial.

EXCESSIVE DAMAGES.

A verdict for \$10,000 on account of personal injuries is excessive, where no bones were broken, no disfigurement inflicted, and the evidence of permanent impairment very slight, showing only an injury to the nervous system which might or might not remain permanently; it appearing that plaintiff though incapacitated for work more or less for a period of several months, and having suffered much pain, had been in bed from his injuries but six days, and that the trial court expressed grave doubts as to the justice of the verdict in passing upon a motion for a new trial.

Appeal from Superior Court, Walla Walla County.—
Hon. THOMAS H. BRENTS, Judge. Modified.

B. S. Grosscup and W. T. Dovell, for appellant.

Garrecht & Dunphy and Bennett & Sinnott, for respondent.

The opinion of the court was delivered by

MOUNT, J.—Action for personal injuries. Plaintiff obtained judgment in the court below for \$10,000. Defendant appeals.

The appellant is a railroad company operating a line of railway between Walla Walla and Pleasant View in Walla Walla county, Washington. On September 15, 1901, the

respondent was an employee of appellant company as conductor in charge of one of appellant's trains of cars operated between the points above mentioned. This train, going out of Walla Walla on the morning of September 15th, consisted of an engine, four water-tank cars, several box cars for freight, a caboose, and a regular passenger coach. On the way out one of the water-tank cars was left at a place known as "Day's Cistern." The place of this cistern was not a regular station, but the trains stopped there whenever water was to be left or cars picked up, and had been doing so for eight years. There was no switch at this point, and cars loaded with water were left standing on the main track, and the water was drawn from the car by means of a trough from the car to the cistern. When the water-tank car was left at this point, the valve of the tank was opened and the car left to empty itself, while the train proceeded on to Pleasant View. On the way back to Walla Walla the train consisted of the engine, two freight cars, the caboose, and the passenger car. When the train arrived at Day's Cistern a brakeman was sent forward by the conductor to couple the water-tank car on to the engine in front. This car was not quite empty and a delay of some few minutes was occasioned. The respondent thereupon, as was his duty, got off the train, and went forward to the head of the train to see what was the cause of the delay. About the time he arrived there the tank-car was emptied and the car coupled on to the engine in front, and the respondent gave the signal to go ahead. The track at this point was on a grade some three and one-half or four feet high. About fifty feet beyond the cistern, on the same side of the track easterly and in the direction the train was going, was a wagon roadway graded up so as to make a crossing over the railway track. This wagon

roadway was about sixteen feet wide. About fifteen feet beyond the wagon roadway was a cattle guard of three posts on each side of the track parallel therewith, on which boards were fastened, and up to which a barbed wire fence connected on each side of the track. The posts of the cattle guard were about two feet four inches from the rail of the track at the bottom, and slanted out from the perpendicular about eight inches or a foot at the top. These posts were about five feet in height. The cars projected over the rail about two feet three inches, so that there was a space of about twelve inches between the side of the car and the top of the cattle guard posts. On account of the high grade along this place, the conductor was not able to get on to the train at the place where he gave the signal to go ahead, so he ran forward a distance of about fifty feet to the road crossing, in order to get on to the train when the rear cars came up to him. The train was running at the rate of about five miles per hour. It was shown that it was usual for the conductor and train men to get on the train when it was in motion. When the rear end of the caboose came up to where the respondent was, he was on the left-hand side of the train as it was going easterly. He took hold of the handles on the side of the car, and attempted to step on the rear end of the caboose. Just then his attention was called by a passenger standing on the rear platform of the passenger coach to a man who was running towards the train evidently desiring passage thereon. Thereupon the respondent's foot slipped, and he had to make another step for the car. He did not see the cattle-guard posts, and, while he was in the act of getting on the train, he was carried against one of these posts, which struck him on the back and knocked him under the car. He was struck again by the brakebeam, and thrown

from under the car and injured. Respondent had made five trips over the road prior to this one, but had not stopped at this place before. He did not know of the nearness of the cattle guard posts to the side of the car. There were some thirty of these cattle guards along this line, but only two of them were as near to the car as this one. Respondent did not know that there was any difference in the location of these cattle guards with reference to their proximity to the track. It was broad day light, and respondent could have seen the posts if he had looked, but, with his attention called to the passenger in the opposite direction, and while looking for a footing on the steps, he did not see it until after he was struck. There was some defect in the step of the car, but it is conceded that respondent knew of this, and that he cannot recover in this action on account thereof.

The principal questions in the case are whether it was negligence for the appellant to maintain the cattle guard so near the track, and, if so, did the respondent know or should he have seen the danger, and had he therefore assumed the obvious risk? We think both of these questions, under the circumstances of this case, were properly questions for the jury. If the erection and maintenance of the cattle guard so near the side of the track was such that an ordinarily prudent person should have foreseen that an accident was liable to happen to persons who had a right to be upon the side of a passenger train at this point, then it was negligence of the company to place it and maintain it there. The conditions surrounding each particular case have much to do in determining what a prudent person would do. When it was shown that this cattle guard was within about eighty-five feet of a station or place where trains were accustomed to stop, where the train men were

usually at or upon the side of the cars, where the posts are so close to the side of the car that there is only a space of twelve or fourteen inches between the posts and the car, and where there appears to be no necessity for such location of the posts, the question of negligence is one for the jury.

Counsel for appellant, however, rely upon the second point, and insist that the respondent, under the circumstances of this case, must be held to have assumed the risk. Numerous authorities are cited from this court and other courts to the effect that where an employee knows, or in the reasonable exercise of his faculties should know, the dangers which surround him, he must be held to have assumed the risk. The following cases are cited from this court: *Week v. Fremont Mill Co.*, 3 Wash. 629 (29 Pac. 215); *Jennings v. Tacoma Ry. & Motor Co.*, 7 Wash. 275 (34 Pac. 937); *Bullivant v. Spokane*, 14 Wash. 577 (45 Pac. 42); *Hoffman v. American Foundry Co.*, 18 Wash. 287 (51 Pac. 385); *Anderson v. Inland Telephone, etc., Co.*, 19 Wash. 575 (53 Pac. 657, 41 L. R. A. 410); *Brown v. Tabor Mill Co.*, 22 Wash. 317 (60 Pac. 1126); *French v. First Avenue Ry. Co.*, 24 Wash. 83 (63 Pac. 1108); *Robare v. Seattle Traction Co.*, 24 Wash. 577 (64 Pac. 784); *Danuser v. M. Seller & Co.*, 24 Wash. 565 (64 Pac. 783). It is unnecessary to review these cases separately. They all, in effect, announce the rule stated above. It is enough to say that in each of the cases cited it was held either that the plaintiff knew of the danger, or that he should have known it in the exercise of ordinary observation. In this case it is not contended that the respondent knew of the cattle guard post by which he was injured. The evidence shows conclusively that he did not know of its dangerous position in relation to the track. The ques-

tion then narrows down to whether he should have known it. In this respect this case is more like the case of *Johnson v. Tacoma Mill Co.*, 22 Wash. 88 (60 Pac. 53), than any of the cases from this court above cited. In that case, where a carpenter was employed to change a pipe in a mill, he was injured by stepping backward into a barrel of hot water. The barrel was sunk into the ground, and unnoticeable by reason of the fact that pieces of bark were floating on the surface of the water. In that case, after reviewing some of the cases above cited, the court said:

“But how different this case is from any of the cases above noticed! There is no question involved here of working with dangerous machinery or of working in the immediate vicinity of dangerous machinery. The plaintiff was not injured by anything he was working with or upon. The cause of his injury was entirely disconnected with, and separate and distinct from, the subject of his work. It is true that if a man is working in a mill or factory, where common intelligence will take notice that dangerous machinery is used, and steps back upon a saw or into a furnace, or upon any dangerous device or machine, he cannot recover damages, because, being charged with knowledge of the existence of these dangerous objects, the danger must be held to be apparent; and while it is true that the plaintiff in this case could doubtless have seen the barrel, if he had looked at it,—and that is the admission which the counsel for respondent sought to obtain, and did obtain—he was under no *obligation* to look for it, and naturally would not look for it, for he had no actual notice of its existence, and it does not appear that it was a necessary or common attachment to mills, or, if it was, that it was the custom to leave it uncovered. It was not a danger incident to the business of putting up a pipe, and under the testimony it was not so conspicuous as to challenge attention; and the plaintiff, being rightfully there in the discharge of his duty, had a right to rely upon the duty of the master to furnish him a safe place in which to work, and

the place evidently not being safe and the danger not apparent, the master, under the authorities, is liable to damages."

The circumstances of that case, it is true, are not the same as those in the one before us, but the case serves to show that the difficulty in all cases of this character is not with the rule of law, because the rule of law is well settled and understood, but arises when we come to apply the rule to cases where the danger is not known, and where it must be determined from the facts that the danger should have been known by the employee. The question, then, resolves itself into this: Do the facts in this case show that respondent should have known the danger? The facts are not disputed, and they are, substantially, that respondent was boarding the train in the usual and ordinary way; that the train was running slowly; that he was about twenty-five feet away from the cattle guard posts; that if his attention had been directed towards these posts he could have seen them; that this was the first time he had stopped off at this place; that he could not board the train except at the crossing; that he had been in the railroad business for about twenty years, was acquainted with the location of cattle guards, and had never known them to be placed so near the track as this one, or to be dangerous; that it was necessary, when boarding a moving train, to look toward the rear of the train, not in the direction the train was moving, and that it was also his duty to look after passengers desiring to board the train; and, while the plaintiff testified that if his attention had been called to the cattle guard he could have seen it, yet it nowhere appears that he could have known, even if he had seen the cattle guard, that it was dangerously close to the cars. We know from common experience that it is difficult to tell how near a car will come to objects along the side of a

railway track, and, until the car stands by the object, one cannot very well judge whether it is dangerous or not. We know, too, that the respondent's attention must have been centered on boarding the train, as he says it was, and that a customary object near the track, like a cattle guard, would not ordinarily attract attention as a dangerous obstacle. Even if respondent could have seen the cattle guard when he ran forward to within twenty-five or thirty feet of it, or even if he should have seen it, we do not think it necessarily follows that he must be held to have known that it was dangerous, especially in the absence of warning or knowledge that it was dangerous; because, in the absence of warning or knowledge, he had a right to assume it was safe, and that it was placed as was usual and customary for such guards to be placed; in other words, that the company had performed its duty by placing the cattle guards far enough away from the cars so as not to be dangerous. For these reasons we think the questions of assumed risk and contributory negligence were for the jury, and that the court could not hold that as a matter of law respondent assumed the risk. The following cases, very much like the case at bar, are in point upon this question: *Sweet v. Michigan Central R. R. Co.*, 87 Mich. 559 (49 N. W. 882); *Johnson v. St. Paul M. & M. Ry. Co.*, 43 Minn. 53 (44 N. W. 884); *Bryce v. Chicago, M. & St. P. Ry. Co.*, 103 Iowa, 665 (72 N. W. 780); *Whipple v. New York, N. H. & H. R. R. Co.*, 19 R. I. 587 (35 Atl. 305, 61 Am. St. Rep. 796).

Two other questions are presented in the case, one of which is the refusal of the court to strike out an answer to a question because it was not responsive. While the court in terms did not strike the answer, it subsequently told the jury that they could not consider evidence of that

character, and this we think was sufficient. The other was an instruction requested by appellant which was modified by the court. The instruction, as given, stated the law correctly. The modification was stated as an exception to the general rule which was being defined. It did not come within the issues of the case, the court did not intend to apply it to the case, and the jury must have so understood it. The respondent did not claim recovery by reason of the exception and at most it was harmless.

We do, however, think the verdict was excessive in proportion to the injury. No bones were broken, and at the time of the trial there were no marks or disfigurements upon the person of respondent, and evidence of any permanent impairment of the respondent was very slight. At the time he was injured he went upon his train with assistance, did some work on the way in, rode from his train home in a buggy, and was in bed for about six days thereafter. The doctor who examined him by the aid of an X ray at the time of the trial could find no evidence of physical injury, and the whole injury at the time of the trial appeared to be to his nervous system, which might or might not remain permanently. It is true that for several months after the injury he was incapacitated for work more or less, and it is no doubt true that he suffered much pain. Counsel for respondent makes a strong argument against this court's reducing the amount, and several cases are cited where we have in effect said it is only in cases where the verdict is clearly in excess of any just measure to such an extent that it shows passion and prejudice on the part of the jury that a verdict will be set aside. It is true, also, that the jury and the court below have advantages in judging of damages which we do not have. But it seems to us that a verdict for \$10,000, in a

case where the injuries are so obscure as they are in this case, is clearly in excess of the just measure. In addition to this, the trial court, in passing upon a motion for new trial upon this ground, said:

"I feel somewhat inclined to sustain the defendant's motion to set aside the verdict as excessive, and grant a new trial, unless the plaintiff remit the damages awarded in excess of \$6,000. Should I require the plaintiff to file a remitter in this excess as a condition for overruling the motion and he should decline to do so, he could not appeal from my action without going through a new trial. If he could have my action reviewed by the supreme court without doing this I should feel more inclined to take this course. Should I err in requiring this or in granting a new trial it would entail much more trouble and expense on the parties than if I should err in overruling the motion for a new trial, and besides if the supreme court should conclude that I had erred in this and in no other respect it may itself require the plaintiff to remit a part of his verdict and judgment, or if he declines, reverse and order a new trial. Partially for these reasons and while I have some misgivings on this point as to the damage being excessive, I deem it the better course—the course that will best conserve the rights of both parties—that will present the question for consideration of the supreme court without jeopardizing the rights of either party, to deny the motion."

The trial judge, who heard the evidence, saw the witnesses and was in a position equal with the jury to judge of the damages, was not satisfied that the amount of the verdict was not excessive. He was inclined to reduce the amount to \$6,000. He did not do so, because, as he says, he had some misgivings as to the amount being excessive, and because this court would do so if we concluded he had erred in denying the motion on that ground. These statements of the trial court, taken in connection with our own

views from a reading of the evidence, convince us that the verdict is excessive, and that \$6,000 is a large measure for the damages proven. The respondent will, therefore, be required to remit \$4,000 from the amount of the judgment in the case within thirty days from the date of the filing of this opinion; whereupon the judgment will be affirmed. Otherwise the judgment will be reversed, and a new trial ordered. Appellant to recover costs on this appeal in either event.

FULLERTON, C. J., and ANDERS and DUNBAR, JJ.,
concur.

[No. 4351. Decided April 21, 1903.]

FIRST NATIONAL BANK OF PULLMAN, *Appellant*, v. CASH
N. GADDIS *et al.*, *Respondents*.

CONVERSION — UNAUTHORIZED LOAN BY BANK CASHIER — PLEADING —
IMMATERIAL ALLEGATIONS.

In an action against bank officers for the conversion of funds, allegations in the complaint to the effect that the converted funds were pretended to be loaned by defendants to a speculative corporation without mercantile credit were immaterial.

SAME — EVIDENCE — MATERIALITY.

Where defendants in such an action are charged with converting money of the bank to their own use, evidence that the corporation to which they claimed the funds had been loaned was of a speculative character, without property, and unworthy of credit was properly excluded because of its immateriality.

SAME — RATIFICATION OF LOAN BY DIRECTORS.

The directors of a bank are estopped to deny the authority of the cashier and assistant cashier in the extension of credit to a speculative corporation in which the latter were stockholders, where the directors had known of the course of dealing for a period of five years without making objection thereto, and consequently the loan of the bank's money to such corporation un-

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der such circumstances is insufficient to establish a conversion of the funds.

STATUTE OF FRAUDS — PROMISE TO ANSWER FOR DEBT OF ANOTHER.

The oral promise of bank officers to repay to the bank money that they have loaned out of its funds to an insolvent corporation is not binding, because a promise to answer for the debt of another, and not in writing.

Appeal from Superior Court, Whitman County.—Hon. STEPHEN J. CHADWICK, Judge. Affirmed.

H. W. Canfield, for appellant.

Thomas Neill (*V. E. Bull*, of counsel), for respondents.

The opinion of the court was delivered by

MOUNT, J.—This action was brought by appellant in the lower court to recover from respondents the sum of \$445.34, alleged to have been wrongfully and unlawfully taken by respondents and converted to their own use. When the action came on for trial in the lower court, and after the plaintiff had introduced its evidence and rested, the court, upon motion of defendants, discharged the jury, and dismissed the action, upon the ground that the evidence was not sufficient to make a cause of action. From this judgment of dismissal plaintiff appeals.

It is claimed that the court erred (1) in striking out certain parts of the complaint; (2) in rejecting evidence going to show that the Kootenai County Mining & Milling Company was a speculative mining company, and unworthy of credit, and (3) in sustaining the challenge to the evidence.

1. The two paragraphs stricken from the complaint upon motion of respondents are as follows:

“4. That said Kootenai County Mining and Milling Company, a corporation, was a speculative corporation and had no other assets of other than speculative value; that the

capital stock of said corporation, the Kootenai County Mining and Milling Company, or any part thereof, was never paid up, and that no part thereof was ever subscribed by any *bona fide* subscription, and that the whole thereof was without any commercial value whatever, and that said corporation was not entitled to any mercantile credit whatever, all of which facts were at all times well known to each and both of said defendants."

"6. That said defendants, after taking, appropriating and converting said moneys as aforesaid, did make a pretense of making a loan thereof to said corporation, the Kootenai County Mining and Milling Company, but that in truth and in fact said moneys were used by defendants and the same was charged on the books of the plaintiff to said corporation, the Kootenai County Mining and Milling Company, in order to conceal from the officers of plaintiff the true facts, and no loan of said moneys was made by defendants to said corporation, the Kootenai County Mining and Milling Company."

The complaint charged the defendants with unlawfully and fraudulently taking the money from the plaintiff, and converting the same to their own use. If these allegations which were stricken from the complaint are true, they are entirely immaterial, because it makes no difference to whom defendants gave the money, or for what they spent it after they took it and converted it to their own use. They would be liable for its return in any event. It was likewise immaterial whether they loaned to an insolvent or to a going corporation, or to a private person, if such loan was made for their own use and benefit, and not for the bank; and therefore allegations of this character were subject to be stricken from the complaint. If it was necessary to show that the money was converted to the use of the defendants, it is probably true that evidence showing the purpose for which the money was used was admissible to show that the defendants had converted the money to

their own use. But the allegation that the money was converted to the use of the defendants was sufficient for that purpose. What is said above applies equally to the evidence offered to show that the Kootenai County Mining & Milling Company was of a speculative character and was without property, and unworthy of credit. This evidence was immaterial, especially where the defendants were charged with converting the money to their own use. It was therefore not error to exclude it.

2. The evidence shows that the defendants were cashier and assistant cashier, respectively, of appellant, which is a banking corporation; that they were also stockholders in the Kootenai County Mining & Milling Company, and that defendant Chapman was also treasurer of the last-named corporation; that the mining company had an account with the bank, which account had been running for about five years; that the account was usually overdrawn; that, in order to balance the account for convenience of bookkeeping, Mr. Chapman, on January 16, 1900, executed a note for the mining company for the sum of \$344.75, and balanced the account with the bank by the note; that subsequently payments were made on the note, and other overdrafts were paid on account of the mining company, thus making up the amount sued for, viz., \$445.34; that the directors and stockholders of the bank had frequent meetings during the time the account was running, and that the directors knew of the account and made no objection thereto; that in February, 1900, when one Mr. Coman and Mr. Stearns were negotiating the purchase of the bank, and were examining the assets thereof, they came to the note and account of the Kootenai County Mining & Milling Company, and thereupon asked defendant Gaddis concerning it, whereupon Gaddis said: "That is a little min-

ing deal that some of us boys have. . . . That is a little matter of Per's and mine; that is a little mining deal of ours; that is a matter we owe and we will take care of it in a short time." Defendant Chapman said: "Of course, we will take it up, but we want you, in order to protect us—we may want you to sue the Kootenai County Mining & Milling Company, and foreclose upon this property. That is, take the property under suit and let us buy it in and shut out these fellows that won't pay their assessments." Defendants were not indorsers, and never in any way than as above stated agreed to pay the account. We think this evidence fails to show either a wrongful taking or a conversion of the money sued for. Even if the Kootenai County Mining & Milling Company was a speculative corporation, and was not entitled to credit in the first instance, and the cashier and assistant cashier of the bank knew that fact, even if they were not authorized to extend credit to the said mining company in the beginning, yet when the directors of the bank knew that credit had been extended, and made no objection thereto, the bank cannot, after five years' dealing with that company, hold the cashier or assistant cashier for the amount which the company may owe the bank at the end of that time. After a course of dealing for such a length of time, where the directors of the bank knew about it, the bank will be held to have ratified the credit. *Roberts v. Washington National Bank*, 11 Wash. 550 (40 Pac. 225). Nor is the oral promise to pay binding upon either of the defendants, because it is at most a promise to answer for the debt of another, which, under the statute, must be in writing. In any view of the case, we think the court did not err in taking the case from the jury. The judgment is therefore affirmed.

FULLETON, C. J., and ANDERS and DUNBAR, JJ., concur.

Apr. 1903.] Opinion of the Court.—FULLERTON, C. J.

[No. 4371. Decided April 21, 1903.]

DAVID M. PAGE, *Appellant*, v. DOMINICK URICK *et ux.*,
Respondents.

FIXTURES — DWELLING HOUSE AS PERSONAL PROPERTY.

A house built by consent of the city upon one of its unused streets, on condition that the builder would remove it upon notice from the city, and resting upon wooden blocks laid on the ground, so as to facilitate removal without disturbing the freehold, is personal property, even though by mistake the house may have been constructed so as to extend over the street line some seven feet upon an adjoining vacant lot.

SAME — CONDITIONAL SALE — REPLEVIN.

Where a dwelling house was personal property, and was sold under a conditional contract of sale, on a breach of the conditions of sale the house could be recovered in an action of replevin by the vendor.

Appeal from Superior Court, Pierce County.—Hon.
THAD HUSTON, Judge. Reversed.

George W. Fogg and H. F. Norris, for appellant.

The opinion of the court was delivered by

FULLERTON, C. J.—In the summer of 1900 the appellant, after obtaining leave to do so from the city authorities, built a dwelling house on what he supposed to be one of the streets of the city of Tacoma, the permit being granted on condition that he would remove the building at any time after receiving thirty days' notice to that effect from the city. By mistake, however, the house was built so as to extend over the line of the street some seven feet on an adjoining vacant lot. The house was built on wooden shoes, extending the entire width of the house, which rested on wooden blocks laid on the ground, so that the house could be removed at any time without disturbing the freehold.

In fact, the purpose of the shoes was to facilitate removal, and enable the appellant to comply without trouble with his agreement with the city. On October 25, 1900, the appellant entered into a written agreement with the respondents, by the terms of which he agreed to sell them the house for a consideration of \$700, \$300 to be paid in cash, and the balance in four annual installments of \$100 each, payable on the 25th day of October of the years 1901, 1902, 1903, and 1904, and a monthly payment of \$6 per month during the time any part of the purchase should remain unpaid in lieu of interest. It was expressly stipulated in the agreement that the title to the property should be and remain in the appellant until the entire purchase money should be fully paid; that upon the final payment of "said \$400, and the further and additional payment of said \$6 per month rent, that then, and in that case, said house shall become the property of said purchasers;" that time was the essence of the contract, and in case of failure to pay the purchase money, or any part thereof, when due, the appellant should have the right to take possession of the house, and the purchasers should vacate the same peaceably, and without legal process. The agreement was signed by both the vendor and vendee, and placed of record in the auditor's office of Pierce county. The respondents paid the \$300 before taking possession of the property, and subsequently paid \$10 additional as rent, but refused to pay anything further, or recognize that the appellant had any rights in the property. At the time of the commencement of this action there were \$80 due as rents or interest, together with the installment of 1901 of \$100. On the refusal of the respondents to make further payment on the purchase price, the appellant demanded possession of the house, and, on their refusal to deliver it up,

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brought this action in replevin to recover it. In his complaint he set out substantially the foregoing facts. The answer was a general denial, and an affirmative plea of ownership on the part of the respondents. On the trial the appellant introduced evidence tending to substantiate all of the allegations of his complaint, and rested, whereupon the respondents moved for a nonsuit, which the court granted. Judgment of nonsuit was thereupon entered, from which this appeal is prosecuted.

The respondents have not appeared in this court, and we are not, therefore, advised as to the reasons which are relied upon to sustain the judgment of the trial court, but, looking to those which obviously suggest themselves, we find none which seem to us conclusive. Under the facts stated, the dwelling house was personal property. *Cobbey, Replevin* (2 ed.), § 373; *Jewett v. Patridge*, 12 Me. 243 (28 Am. Dec. 173); *Comm'rs of Rush County v. Stubbs*, 25 Kan. 322. The contract was a conditional sale, in which title did not pass to the vendee, and the property was subject to recovery by the vendor on a breach of the conditions of sale. *Edison General Electric Co. v. Walter*, 10 Wash. 14 (38 Pac. 752); *Quinn v. Parke & Lacy Machinery Co.*, 5 Wash. 276 (31 Pac. 866); *Cherry v. Arthur*, 5 Wash. 787 (32 Pac. 744); *Harkness v. Russell*, 118 U. S. 663 (7 Sup. Ct. 51). A dwelling house, which is personal property, can be recovered by the owner from one wrongfully in possession by an action of replevin. *Comm'rs of Rush County v. Stubbs, supra*; *Michigan M. L. Ins. Co. v. Cronk*, 93 Mich. 49 (52 N. W. 1035); *Weathersby v. Sleeper*, 42 Miss. 732; *McDaniel v. Lipp*, 41 Neb. 713 (60 N. W. 81); *Fitzgerald v. Anderson*, 81 Wis. 341 (51 N. W. 554). On the record, therefore, it would seem that the trial court erred in granting a nonsuit. The

appellant, by his evidence, showed ownership of the property, a right to its possession, a demand on the respondents for its surrender, their refusal to surrender it, and their consequent wrongful detention of the same. As the property was subject to replevin, these proofs made a *prima facie* case, easily sufficient to sustain a judgment, if the jury found them to be true. The rule is not changed because it appeared that the house was built in part on the land of another by mistake. The owner of that property cannot claim it until, at least, he has directed its removal and the appellant delayed doing so for an unreasonable time.

The judgment is reversed, and the cause remanded for a new trial.

MOUNT, ANDERS and DUNBAR, JJ., concur.

31 604
33 814
31 604
33 333

[No. 4379. Decided April 21, 1903.]

HELGE A. HANSEN, *Respondent*, v. SEATTLE LUMBER
COMPANY, *Appellant*.

NEGLIGENCE — LIABILITY OF MASTER — SUFFICIENCY OF EVIDENCE.

In an action by a servant for personal injuries, where there is no evidence, either direct or circumstantial, as to how the accident happened, but merely evidence of different causes that could have produced the injury, for some of which the master might have been liable, there can be no recovery unless it is established that the injury could have been produced in no other way than by some act or omission amounting to negligence on the part of the master.

Appeal from Superior Court, King County.—Hon.
GEORGE MEADE EMORY, Judge. Reversed.

Apr. 1903.] Opinion of the Court.—FULLERTON, C. J.

Preston, Carr & Gilman, for appellant.

James J. McCafferty and *Tucker & Hyland*, for respondent.

The opinion of the court was delivered by

FULLERTON, C. J.—This is an action for personal injuries. The jury returned a verdict for the respondent, who was plaintiff below, and this appeal is from the judgment entered thereon.

The appellant is engaged in the business of manufacturing shingles. On August 11, 1901, the respondent, who was then sixteen years of age, applied to appellant for employment, and was put to work by appellant's foreman at moving shingle bolts from one part of the mill to another. Later he was put to work nailing zinc strips on bands used for binding bundles of shingles. After he had worked at this for a short time, the foreman came to him, told him he had an easier job for him, and took him to a saw used for sawing the bands with which bundles of shingles are bound. This was a circular saw, about twelve inches in diameter, set into a flat-topped table, so that the top of the table was on a level with, or a little above, the top of the shaft to which the saw was fastened, and which formed its axis. The saw was run by a belt from a pulley on the main shaft of the mill to a pulley on the shaft of the saw. It revolved towards the operator. On the right of the saw (looking from the operator's position), and distant therefrom the width of the bands, was a guide between four and six inches high, against which boards were pressed when being pushed against the saw. To facilitate the operation of sawing, and as a protection to the operator, the appellant had fixed on the table what is called a "carriage." It was a flat

piece of board, made to run back and forth to the left of the saw from the operator's position, held in place by a tongue fastened to its under side, which ran in a groove cut in the top of the table. On the end of the carriage towards the operator was an endpiece of a proper height to furnish a rest for the ends of the boards when placed on the carriage for sawing. Still further back was the handle with which the carriage was operated. The pieces of board out of which the bands were made were cut to their proper length and thickness elsewhere, this saw being used to cut them to their proper width only. The manner of operating the saw was this: The operator would draw the carriage back a sufficient distance to allow a board to be placed between the saw and the endpiece of the carriage. He would then place a piece of board on the carriage, push it over against the guide, steady the piece with his left hand, take hold of the handle of the carriage with the other, and slide the carriage past the saw; cutting the board lengthwise to a proper width for a band. The carriage would then be drawn back, the board pushed over against the guide, and another piece cut off; the operation being repeated until the board was cut into bands. When the respondent and the appellant's foreman reached the saw, the foreman (so the boy testified) did not give him any oral instructions as to its method of operation, but started the saw without a word, picked up some boards, and proceeded to saw them; cutting up some dozen pieces. He then motioned to the boy, indicating that he wished him to try it. The boy then took hold of the work, and proceeded to cut the bands in the manner in which he saw the foreman do it. The foreman stood by and watched him until he had sawed some half dozen boards, when he went away. After a short time he returned, and watched

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the boy operate the machine for a few moments longer; again leaving without saying anything. In less than an hour from that time the boy in some manner brought his hand in contact with the saw, seriously and permanently injuring it. The machine itself was standard, and the kind in use in nearly all shingle mills. The device called the "carriage," however, seems not to be in common use, if it was not altogether new to this machine. But it was not testified by any one that it increased the dangers of operating the saw, and it was in evidence that it greatly lessened them. The boy was alone when the accident happened. While on the witness stand he did not attempt to give any explanation as to its cause. Being questioned on this point by his counsel, he testified as follows:

"Q. Now how long do you think that you were to work on the machine before anything happened? A. About an hour. Q. Then what happened? A. I got my hand hurt. Q. Now, how did that happen? A. I don't know. Q. What were you doing at that time? A. Sawing the boards as I had always been doing—as he told me."

Nor is there elsewhere in the record anything which tends to show what caused the accident. Some evidence, however, was introduced tending to show what could have caused it. It was testified that any one of several things would cause the saw to pinch, and that the pinching of the saw would tend to tilt the carriage towards the saw. It was testified, also, that if sawdust, splinters, or other substances were permitted to collect under the carriage, or if it should be accidentally thrown out of the groove by the operator, it would have a tendency to tilt towards the saw, and, as a consequence, endanger the operator, but there was nothing in the entire record that shows or tends to show that the injury was caused by any one or more of these things.

The appellant made the contention in the court below, and contends here, that the evidence was insufficient to justify the verdict. This contention, we think, must be sustained. In order for the respondent to recover for his injury, it was necessary for him to show not only that the appellant had been guilty of negligence, but that such negligence was the cause of his injury. It is not necessary, of course, that the facts be proven by direct evidence. Circumstantial evidence of the fact is sufficient. But there must be some evidence, either direct or circumstantial, that there was negligence on the one side, an injury resulting in damages on the other, and that the injury and damages followed the negligence, and were produced thereby. The evidence here falls far short of this. It may be true that there was evidence before the jury from which negligence could be inferred. Doubtless it was the appellant's duty to inform the respondent of the hidden or latent dangers connected with the operation of the machine, and it was negligent in failing to perform that duty; and had it been shown by evidence, either direct or circumstantial, that the injury was caused by some one or more of the hidden or latent dangers which the respondent had not been warned against, the appellant would be liable in damages for his injuries. But there is no direct evidence as to the cause of the injury, and it is not proving his case by circumstantial evidence for the respondent to show that there were causes, for which the appellant would be liable, which could have produced the injury, without showing that it could not have been produced in any other manner, or in a manner for which the appellant would not be liable. As was said by Mr. Justice BREWER in *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658 (21 Sup. Ct. 275):

“The fact of accident carries with it no presumption of

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negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. . . . That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, where there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs.”

Tested by these rules, the judgment cannot stand. There is no evidence in the record that the negligence of the appellant caused the injury for which the damages were awarded, and the jury's finding was based upon mere conjecture.

The judgment is reversed and the cause remanded, with instructions to dismiss the action.

MOUNT, ANDERS and DUNBAR, JJ., concur.

[No. 4440. Decided April 24, 1903.]

WEST COAST MANUFACTURING AND INVESTMENT COMPANY, *Appellant*, v. WEST COAST IMPROVEMENT COMPANY, *Respondent*.

COVENANT OF WARRANTY—LOSS OF PART OF LAND—ACTION FOR BREACH—MEASURE OF DAMAGES.

The measure of damages for breach of a covenant of warranty, where title has failed to part of the tract conveyed, is such proportion of the consideration paid as the value of that part of the land to which the title has failed bears to the value of the whole tract, together with interest on such proportion.

SAME—CONDITIONS OF CONTRACT OF SALE—MERGER IN DEED.

In determining the purchase price of land with a view to fixing the measure of damages upon a breach of warranty, the value of improvements placed upon the land by the grantee cannot be included, although the contract for a conveyance was conditioned upon the erection of the improvement and the payment of the money consideration, inasmuch as such preliminary contract had become merged in the deed upon which the action was founded.

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Affirmed.

James Kiefer, for appellant.

Piles, Donworth & Howe, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This case arises out of a conveyance made by respondent to appellant on August 13, 1890, for a tract of land in Ballard, King county, consisting of a narrow strip of upland and a large piece of tide land; the proportions being substantially one-fifteenth upland and fourteen-fifteenths tide land. The contract of sale was made November 13, 1889, and recites that the respondent agrees

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to convey to the appellant the tract described in the deed, for the consideration of \$750 in money, upon condition that the appellant commence work on or before December 1, 1889, and on or before April 1, 1890, have in operation a mill upon the tract in question. In 1894 the tide land described in the deed was platted and appraised by the state of Washington and offered for sale, and on June 26, 1895, the appellant purchased from the state of Washington the said tide land at a cost of \$1,522.72, the appraised value. The purchase of this tide land at the price above indicated is alleged in the complaint. The consideration mentioned in the deed is the sum of \$750. A demurrer was interposed to the complaint, which was sustained, and the action dismissed on the ground that the complaint did not state facts sufficient to constitute a cause of action. From a judgment of dismissal, defendant appealed, and the judgment of the superior court was reversed. 25 Wash. 627 (66 Pac. 97). In reversing the case this court held that the assertion by the state of a paramount title constituted a breach of the covenant of warranty under the circumstances shown by the complaint, but did not pass on the question of the measure of damages. After the return of the cause to the superior court, the defendant answered, plaintiff replied, and the cause was tried before a jury. The trial court ruled out most of the testimony offered by the defendant, and instructed the jury to return a verdict for the amount claimed in the complaint, with interest, without leaving the jury box. The jury thereupon returned a verdict in accordance with the instructions of the court for \$2,131.50. Defendant duly moved that the verdict be set aside and a new trial granted. The court, after consideration, made an order setting the verdict aside and granting a new trial; and from this order plaintiff has ap-

pealed, alleging that the court erred in granting the new trial.

The case presents the single question of what is the measure of plaintiff's recovery. The court adopted the theory that the measure of damages was the amount paid the state to acquire its title, with interest from the date of payment; and it is insisted by the appellant that this was the correct rule, and that the court therefore erred in granting a new trial. Passing by the first proposition discussed by the respondent, viz., that, where a trial court sets aside a verdict and grants a new trial generally, the order granting a new trial will not be reversed unless the trial court has abused its discretion, we think it advisable to determine in this cause the proper measure of damages, to prevent the necessity of another appeal on that question. It is insisted by the appellant that this question has been passed upon by this court in *Cade v. Brown*, 1 Wash. 401 (25 Pac. 457), where the measure of damages in an action for breach of a contract was held to be the value of the land at the time of the breach, less the price plaintiff was to pay therefor, together with any special damages the plaintiff might prove in purchasing lumber to erect the buildings on the premises. But it will be observed that in that case the grantor had been guilty of fraud, and purposely disabled himself from complying with his contract by subsequently conveying the land to another after the value of the land had increased; thereby fraudulently attempting to deprive the purchaser of the fruits of his contract. However, that case is not in point here, where the failure of title to a part of the land is not through any fault of the grantor. That this court did not attempt to adopt the rule that the measure of damages is the value of the land at the time of the breach is plainly shown by the

decision in *Morgan v. Bell*, 3 Wash. 554 (28 Pac. 925, 16 L. R. A. 614), where it was held that the measure of damages for the breach of a contract for the conveyance of land which the party contracting to convey did not own was whatever amount had been paid him on the contract, with interest thereon from the date of payment. The decisions on this question were examined and analyzed in *Morgan v. Bell*, and the rule therein announced was adopted as the one which seemed to be most in consonance with equity and fair dealing and the conditions surrounding this country. There, in speaking of the rule that the measure of damages should be the value of the land at the time of the breach, it was said:

"If such a rule were adopted in this western country, where what is cheap agricultural or farming land one year is valuable city property the next, and where the laws, by reason of the formative condition of the state, are unsettled and unadjudicated, a conveyance of land would be a perilous transaction which a prudent man might well hesitate to engage in."

There are some cases, notably from the New England states, which hold to the rule contended for by appellant. Mr. Rawle in his work on Covenants (5th ed.), § 164, after noticing the cases holding to this rule, observes, "the cases which support the opposite rule are much more numerous," and states that "the rule that the measure of damages on the covenants for quiet enjoyment and of warranty is limited by the consideration money and interest may be said to be now settled law in the states of New Hampshire, New York, New Jersey, Pennsylvania, Virginia, Ohio, North Carolina, South Carolina, Georgia, Kentucky, Indiana, Tennessee, Arkansas, Missouri, Iowa, Wisconsin, Maryland, Nevada, Nebraska, Montana, Texas,

Kansas, Dakota, and California," and that "such a rule has also been adopted by the supreme court of the United States;" citing *Hopkins v. Lee*, 6 Wheat. 118. The cases cited by the respondent, viz., *Collier v. Cowger*, 52 Ark. 322 (12 S. W. 702, 6 L. R. A. 107); *Cheney v. Straube*, 35 Neb. 521 (53 N. W. 479); *Cox's Adm'rs. v. Henry*, 32 Pa. St. 18; *Foote v. Burnet*, 10 Ohio, 317 (36 Am. Dec. 90), and *Brady v. Spurck*, 27 Ill. 478, all sustain this rule. The respondent asked the court to instruct the jury that, if they found for the plaintiff, the amount of their findings was to be ascertained as follows: They were to determine the relative value of the tract of land to which the title had not failed, compared with the value of the tract of land to which the title had failed, as that value existed at the time of the conveyance from defendant to plaintiff, and, having ascertained that, they were to consider the amount paid as a consideration for the whole conveyance; that they were to determine the actual consideration paid for the parcel of land to which the title had failed by taking such proportion of the whole consideration paid as the relative value of the parcel to which the title had failed bore at that time to the whole parcel; and that their verdict should be for the amount of consideration paid for the parcel to which the title had failed, ascertained as before stated, with interest on that amount up to the present time; but that in no event could their verdict exceed the amount of the purchase price. This instruction, which we think was a proper statement of the law and should have been given to the jury, was denied. In *Major v. Dunnivant*, 25 Ill. 262, it was held that, when the title fails to a part of the land sold for a gross sum, the measure of damages for a

breach of the covenant of warranty is such a proportion of the consideration paid as the value of that part of the land to which the title has failed bears to the value of the whole land and interest on such proportion. In *Mischke v. Baughn*, 52 Iowa, 528 (8 N. W. 543), it was held that in an action for a breach of warranty in a deed of an entire lot, brought by a subsequent grantee of a portion only of such lot, he was entitled to recover only such proportion of the consideration money and interest as his proportion of the lot bore to the entire lot; that the burden of proof as to what that proportion was, was upon plaintiff; and that, there being no proof upon such point, it was error to allow him to recover the consideration paid for the entire lot. To the same effect is *Dimmick v. Lockwood*, 10 Wend. 142. This rule, it seems to us, is in consonance with right. In ascertaining damages in the case of failure of title, the same general rules ought to apply as in any other case where damages are sought; that is to say, the whole transaction should be taken into consideration, and only such damages allowed as are actually suffered.

As to the contention of the appellant that, under the terms of its contract, it constructed a mill on the land, we think this was properly disposed of by the court on the ground that the contract had become merged in the deed. It was for the jury to say, under all the circumstances of the case, whether the appellant had actually incurred any damages, considering the whole transaction, and, if so, what those damages were, limited by the rule which we have announced, that the measure of damages would be the amount paid for the land obtained by the state, not exceeding the amount of the original purchase price, and further limited by the relative values of the land to which

the title failed and the land to which the title did not fail.
The judgment is affirmed.

FULLERTON, C. J., and MOUNT, and ANDERS, JJ., con-
cur.

[No. 4426. Decided April 27, 1902.]

ELMER DEWALD, *Respondent*. v. JOHN C. INGLE, *Ap-
pellant*.

EVIDENCE — OPINIONS OF WITNESS — AMOUNT OF DAMAGES.

In an action for personal injuries testimony of the plaintiff as to the money value of his damages is inadmissible.

APPEAL — EXCEPTIONS TO EVIDENCE — SUFFICIENCY.

When a proper exception to the admission of testimony has been taken, but overruled by the court, it is sufficient to apply to subsequent errors of the same kind in the examination of the witness, although the question to which specific objection was raised may not have been intelligently and responsively answered.

Appeal from Superior Court, Lincoln County.—Hon.
CHARLES H. NEAL, Judge. Reversed.

Martin & Grant, for appellant.

Merritt & Merritt, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This action was commenced by respondent for damages resulting from injuries received in a fight with appellant. On the 4th day of August, 1901, appellant, accompanied by a woman to whom he was engaged to be married, and whom he afterwards did marry, and her little boy, was driving through the village of Lahoma, in this state, along the road in front of a saloon, where several men were assembled. As they were driving

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436	197
31	616
38	346
31	616
41	54

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peaceably by, these men began to halloo at them, calling the appellant vile and vulgar names, and using language too indecent to be recorded, but which appears in the statement of facts. Appellant urged his team up, attempting to get out of hearing, but, as the obscene language increased, he was so outraged and irritated that he got out of his buggy and started back, when the man who had been blackguarding him ran into the saloon. On his way back he picked up two rocks. When he stepped into the saloon he asked who had insulted him and his intended wife, and the respondent answered him with an oath. Blows followed, and the appellant struck the respondent over his head with one of the rocks, which inflicted the injury complained of. This statement, it will be understood, is in accordance with the testimony of the appellant, the respondent testifying that he was not one of the crowd that halloosed to the appellant as he was passing by, and that he did not answer him in the saloon in the manner asserted by appellant. The trial resulted in a verdict and judgment for respondent in the sum of \$1,000. From such judgment this appeal is taken, and the assignments are: (1) That the court erred in overruling the motion for a new trial; (2) in permitting respondent to testify, over appellant's objection, as to the amount of his damages in money; (3) in permitting counsel for respondent to re-examine and cross-examine respondent as to the amount of his damages; (4) in admitting a rock in evidence, over appellant's objection for the reason that said rock had never been identified; and in giving the jury certain instructions.

The respondent moves to dismiss this appeal for the reason that no exceptions or objections were ever taken, as by law required, or at all, to any of the rulings and decis-

ions of the trial court, and no exceptions or bill of exceptions was ever taken, filed, or presented in the trial court; that the statement of facts certified to this court should not be considered by this court for the reason that no exceptions were taken to any of the rulings of the trial court. An examination of the record shows that this motion is entirely without merit, and it will therefore be denied.

The first error alleged is necessarily involved in the second, namely, that the court erred in permitting respondent to testify, over appellant's objection, as to the amount of his damages in money. After the statement by the plaintiff of his condition resulting from the blow which he received at the hands of the appellant, the witness was asked to state as near as he could the approximate damages he had sustained. The answer was:

"Well, I would not have been hit for anything. Q. Can you state your damages in dollars and cents? A. Well, I would not have it there for one or two thousand dollars."

The attorney for the plaintiff, not being satisfied with the answer, proceeded:

"Q. I will ask him this question: I will ask you if you can place a value upon the pain and suffering of that scar in your estimation. A. No, I can not. Q. You don't understand me. Can you place a value upon the pain and suffering you sustained by reason of that blow? A. Just as I tell you. It keeps aching right along. Q. Can you fix the price of that pain and ache in dollars and cents? A. No, sir. Q. Has it been any damage to you in dollars and cents? A. Well, I think it has. Q. Tell us how much you have been damaged in dollars and cents. A. I guess about seven dollars. Q. I am talking about the pain, you told the jury you are suffering, and that you have a scar there. Now I am asking you to place a value upon that if you can in dollars and cents; what has it damaged you? You can certainly tell that. A. About \$2,000 anyway; that much damage."

Still not satisfied with this answer, the counsel for respondent pursued his questions as follows:

"Q. Now, Mr. DeWald, you have stated that this has been aching and paining and hurting you ever since you were struck, and still continues that way, and there is a scar there of considerable length. Do you understand that I am asking you how much that pain and scar and suffering has damaged you? A. It has damaged me \$400 or \$500 anyway. Q. You would be perfectly willing to have it there for four or five hundred dollars? A. Yes."

There is no gainsaying the general rule that it is not within the province of a witness to testify as to the value of damages sustained, but that he should testify only to the facts, from which the jury will determine the amount of the damages. The rule is thus stated by 3 Sedgwick on Damages (8th ed.), § 1290:

"Another general rule, which pervades all our law, is that the witness is to testify only to facts. He is to speak as to the facts which he has heard or seen. His opinion is not to be given; for it is the opinion of the jury on the testimony which forms the verdict and decides the case."

There are, however, some exceptions to this general rule, notably the testimony of experts on questions of science and skill, where the jury are not capable of determining the logical results or effects of a given statement of facts. In such cases it becomes necessary for some one, who is able to properly and intelligently interpret facts, to state to the jury the result of a fact or combination of facts. This testimony is admitted, in spite of the general rule, from the necessities of the case. In such case it is left to a cross-examination to elicit the qualifications of the witness to testify in such cases. But in the case at bar a cross-examination would be futile, for it could elicit nothing but a reiteration of the conclusion announced by the

witness that he was damaged in a certain amount. This must necessarily be so, for if there were any facts which he could state to elucidate his condition to the jury, by means of which they could determine the amount of damage, those facts, instead of the opinion of the witness, should have been submitted to the jury, and would have avoided the necessity of the expression of opinion. The testimony in this case illustrates forcibly the fallacy of permitting the opinion of the witness as to the amount of his damage to go to the jury. It was held in *Anderson v. Ogden Union Ry. & Depot Co.*, 8 Utah, 128 (30 Pac. 305), that the amount of damages recoverable for personal injuries in any case is not to be determined by the opinions of witnesses, but is for the jury under all the circumstances of the case. In *Ohio & M. Ry. Co. v. Nickless*, 71 Ind. 271, as in the case at bar, where the plaintiff testified for himself as a witness, after testifying to his injuries, the following occurred:

"The plaintiff was here asked to state the amount of damages he had sustained by the injuries he had described, to which question the defendant objected, for the reason that it was simply asking for the opinion of the witness; whereupon the court ruled that the witness might state the facts showing the extent of his damages, and calculated to measure the amount of his damages; that he had already spoken about loss of time and medical attention; that he might state any other pertinent matters, but that his mere opinion was not worth anything; that the jury founded their verdict on facts, and not opinion, *but that, where an amount constituted a fact, it might be given.* . . . The witness then stated that he had sustained damages to the amount of at least five thousand dollars."

In passing upon the question of the legality of this testimony, the supreme court of Indiana said:

"The evidence of the plaintiff as to the amount of damages sustained by him was clearly incompetent; and the ruling of the court, that, where the amount of damages constituted a fact, the statement of the witness as to the amount might be given, was erroneous. The witness might very properly describe his injuries, but it was not competent for him to estimate the amount of damages which he had sustained. That was for the jury to determine. Nor can we say that the testimony was harmless, because the jury returned two thousand dollars as the damages, instead of five thousand dollars, the amount estimated by the plaintiff. We cannot say that the amount found was not in some degree influenced by the estimate which the plaintiff put upon his damages."

So, in the case at bar, it would be difficult to understand the verdict of the jury on any other theory than that they compromised the statements made by the respondent himself as to the amount of his damages, for he stated at one time that he was damaged at least \$2,000 and at another that he was damaged from four to five hundred dollars, and that he would be perfectly willing to have the pain and scar there for four or five hundred dollars. In *Atchison, T. & S. F. R. R. Co. v. Snedeger*, 5 Kan. App. 700 (49 Pac. 103), it was held that in an action for the recovery of damages on account of personal injuries, it was error to admit a witness, over objection, to give his opinion as to the amount of damages suffered by plaintiff.

The above cases are all cases involving claims for damages for personal injuries. But other courts have laid down the same rule in other damage cases, and where the same principle is involved. In *Chicago & A. R. R. Co. v. Springfield & N. W. R. R. Co.*, 67 Ill. 142, where a witness was asked the direct question of what the damages would be under a given state of facts, and his answer was that there would be no damage, the supreme court said:

"This evidence was improper, not only upon the ground that the question called for the mere opinion of the witness, upon the assumption that appellee would put in the work when in nowise obligated to do so, but upon the further ground that it was an opinion covering the very question which was to be settled by the jury, and so conclusive of it as to leave to the jury no other duty but that of recording the finding of appellant's witnesses. It amounts to nothing more nor less than permitting the witnesses to usurp the province of the jury."

In *Evansville, etc., R. R. Co. v. Fitzpatrick*, 10 Ind. 120, it was said:

"But the opinions of witnesses, as to the amount of damage done by the construction or operation of the road, are not competent evidence. They may state the particular injuries, and the jury are to form their own conclusion of the amount, from the facts proved. . . . In the case at bar, the interrogatories, in effect, call upon the witness to estimate the damages, and the answers plainly show a mere opinion as to the amount. Plaintiffs' objections were well taken, and should have been sustained."

In *Wichita & W. R. R. Co. v. Kuhn*, 38 Kan. 675 (17 Pac. 322), the following question was asked:

"How much less, in your opinion, is this farm worth after the railroad company had established their track through it, irrespective of any benefits from any improvements proposed by the railroad company to be derived from said track, taking into consideration all incidental loss, inconveniences, and damage, present and prospective, which may be reasonably expected or shown to exist from the maintaining of said railroad track, to be continued permanently. *Ans.*: About \$2,100."

The supreme court, in commenting upon this testimony, said:

"The court below certainly should not have permitted this evidence to be introduced. It involved substantially everything that the jury were called upon to determine;

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and left nothing for the jury to decide. It invaded the province of the jury. It really amounted to letting the witness himself determine by his own opinion what the damages were, and the amount which the plaintiff should recover in the action."

"The opinions of witnesses, as to damage or loss, are not competent evidence, even in cases where the damages claimed are a proper subject of recovery. The facts, and *all* the facts going to show what the damages would be, should be given in evidence; and the jury must then draw their conclusion from the testimony of the witnesses as to the amount of the damage." *Giles v. O'Toole*, 4 Barb. 261.

In *Norman v. Wells*, 17 Wend. 136, the court, in speaking on this proposition, says:

"The single opinion of no man can be followed. The best would be utterly delusive. Even where a witness is able to speak to all the facts of the particular case, his opinions are not to be received. I know that in questions of insanity, some courts allow witnesses to throw in their opinions from what they have seen and heard. But I always found that such cases were much better tried, where opinions were kept entirely out of view; and I have generally excluded them, except where they came from professional men. . . . The amount of indemnity, where it is not capable of being reached by computation, is always a question for the jury. If there be any rule without exception, it is this; and I have been unable to find any instance where the opinion of witnesses has been received. Bacon and Symonds, who were sworn in this case, might have possessed some knowledge in respect to the case peculiar to themselves. Every witness is supposed to have such knowledge; but he does not therefore become an expert, and entitled to speak on the general point of damages. If one may speak, another may. It is no reason for receiving such evidence that the defendant may cross-examine. That he might do of course; and the trial might thus be

protracted to an amazing length in taking opinions from the neighborhood.”

In *Cook v. Brockway*, 21 Barb. 331, in the discussion of this proposition, it was said:

“The witnesses should have stated the facts, and the jury should have exercised their judgment, and pronounced the damages. . . . The principle that witnesses shall not invade the province of the jury is an important one, and there is great danger in departing from it. If the opinions of witnesses are to be substituted for the judgment of the jury, upon the evidence, parties will be able, by selecting their witnesses, and by talking and reasoning with them, etc., to control the amount of the verdict. Matters of opinion upon questions of damages are very uncertain; and whether the witness is honest in the opinion he gives is a matter that can rarely be decided. He may be corrupt and yet beyond the reach of punishment. If he swears to facts corruptly he may be punished; and generally the party against whom he testifies will have it in his power to give evidence upon the question, and protect himself upon the trial. But without pursuing the subject, the rule is well settled, and it should be adhered to in its true spirit.”

To the same effect are: *Harger v. Edmonds*, 4 Barb. 256; *Wilcox v. Leake*, 11 La. An. 178; *Fish v. Dodge*, 4 Denio, 311 (47 Am. Dec. 254); *Atlantic & G. W. R. Co. v. Campbell*, 4 Ohio St. 583 (64 Am. Dec. 607); *Shepherd v. Willis*, 19 Ohio, 142; *Morehouse v. Mathews*, 2 Comst. 514; *Elwood Planing-Mill Co. v. Harting*, 21 Ind. App. 408 (52 N. E. 621); *Bonner v. Copley*, 15 La. An. 504; *Bissell v. Wert*, 35 Ind. 54; *Cleveland & P. R. Co. v. Ball*, 5 Ohio St. 568; *Abbott*, Trial Evidence, p. 349, § 85; *Dalzell v. Davenport*, 12 Iowa, 437; *Tingley Bros. v. Providence*, 8 R. I. 493; and many other cases, too numerous to mention, some of which are cited in the appellant's brief. In fact, the uniform authority is to the effect that such testimony is inadmissible.

Respondent, in defense of the admission of this testimony, cites but few cases, two of which are from this court. In *Sears v. Seattle Consolidated Street Ry. Co.*, 6 Wash. 227 (33 Pac. 389, 1081), where the question asked the witness was, "What was there, if anything, to prevent him [the motorman] stopping the cars and applying the brakes a long time before he did?" the answer was, "He was running at too high speed to stop it at that distance." This testimony simply went to the cause of the injury, and not in any way to the value of the resulting damages. In *Sutton v. Snohomish*, 11 Wash. 24 (39 Pac. 273, 48 Am. St. Rep. 847), the witness gave his opinion as to whether the respondent was badly hurt by the fall, and his testimony was sustained by this court. It is true this was an expression of opinion as to the character or degree of the injury, just as was the testimony of the respondent in the case at bar that the injury inflicted gave him great pain. But in the case at bar, in addition to the statement of the injury respondent is permitted to measure the damages resulting from the injury—the very question at issue in the case and which was not involved in the case of *Sutton v. Snohomish*. We have examined the other cases cited by the respondent, but none of them sustain the testimony introduced in this case to which objection is made.

This recalls the contention of the respondent that the question of the admissibility of this testimony is not properly raised by the appellant, for the reason that the question first asked the witness in regard to the amount of damages which he had sustained was not intelligently answered, and that subsequent questions of the same kind were not objected to. An examination of the record shows that when the witness was asked to state his opinion in regard to the value of his damages, the objection was as follows:

"We object to the question for the reason that it is incompetent, irrelevant and immaterial, and is not the proper manner to prove damages for the reason that it invades the province of the jury, and it is not proper testimony as the witness should only be permitted to testify to facts from which the jury are to determine the damages."

The court overruled the objection, and an exception was taken. The answer was: "Well, I would not have been hit for anything." It is true that, to the subsequent questions in relation to the damage of the plaintiff in dollars and cents, no objection was made by the defendant, but he had already stated his objections, those objections had been overruled and an exception taken; and no good purpose would have been subserved ~~in~~ ~~retarding~~ the progress of the suit by ~~constantly~~ objecting and preserving exceptions to the identical character of questions that had already been admitted by the court over his objections. The objection to this character of testimony was made, exception was taken to its admission over the objection, and a motion for a new trial was made upon the ground of errors of law occurring at the trial, to which exceptions were taken. We think that the error is properly presented to this court.

This view of the question of the inadmissibility of this testimony renders unnecessary the discussion of the other errors assigned. The judgment will be reversed, and a new trial granted.

FULLERTON, C. J., and MOUNT and ANDERS, JJ., concur.

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[No. 4468. Decided April 27, 1903.]

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38 168

JAMES F. LEGHORN, *Appellant*, v. REVIEW PUBLISHING
COMPANY, *Respondent*.

LIBEL.—TRUTH AS A DEFENSE.

In a civil action of slander or libel, the truth of the matter published is a complete defense.

SAME.—VARIANCE.

In an action for libel on account of a newspaper article charging plaintiff with abstracting money from a "special postal fund", evidence that the fund was really a "deposit made with the postmaster, as a cash bond" by a newspaper to secure the payment of postage as required by law would not constitute such a variance as to invalidate the defense set up that the alleged libelous matter was true.

SAME.—SUFFICIENCY OF EVIDENCE.

Where there is no direct charge in a publication that plaintiff committed embezzlement in abstracting funds belonging to another for his own private use, but merely a statement of the facts, it would not be incumbent on defendant, in sustaining the truth of the charge, to prove all the elements of the crime of embezzlement.

Appeal from Superior Court, Spokane County.—Hon.
LEANDER H. PRATHER, Judge. Affirmed.

Nash & Nash and James Dawson, for appellant.

Stephens & Bunn, for respondent.

The opinion of the court was delivered by

MOUNT, J.—This is an action to recover damages for alleged libelous articles published by respondent in the Daily Spokesman-Review of Spokane. The complaint charges four causes of action. The first is based upon a publication which appeared in the issue of November 17, 1901, as follows:

"The Leghorn Shortage.

As United States senator dictating the federal patronage of this state, Wilson forced Fred Leghorn, an active and long time worker in his machine, upon Postmaster Temple. Later Mr. Temple and a United States postal inspector discovered that Leghorn was unfit for the place. In checking up his accounts they found that he had abstracted \$100 from a special postal fund, and expended it on his private affairs. The inspector directed Postmaster Temple to remove Leghorn, and when Mr. Temple performed his sworn duty, he excited the violent anger of John L. Wilson. Notwithstanding Wilson was advised of the reasons for Leghorn's removal, he called on Mr. Temple at the postoffice and upbraided him in violent language. 'You've played h—l now, haven't you?' was the undignified salutation, and when Mr. Temple asked him what was his meaning, he replied that he meant the removal of Leghorn. No one knew better than Wilson knew it that the position of assistant postmaster was one of extraordinary financial trust. The monetary transactions of this office aggregate more than three million dollars per annum, and it is of the greatest importance that the assistant postmaster be a man of the highest standards. Wilson had special reason to be impressed with the force of this obligation, for an assistant postmaster of his selection, under the postoffice administration of Arthur J. Shaw, had embezzled several thousand dollars and killed himself when confronted with his crime. But notwithstanding his knowledge of the great responsibility of the office, and the fact that Leghorn's removal had been directed by the postoffice inspector for cause, Wilson wanted him retained in office, and was violently angry because of his removal. It is disclosures of this nature, revealing Wilson's unscrupulous methods, that have shocked the public and compelled conscientious and honorable republicans to withdraw their support from him. They are deeply impressed with the conviction that so long as the Wilson machine is dominant in the party councils there can be no lasting peace or victory."

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The second, third and fourth causes of action are based upon three separate publications of the same article, which appeared in the issues of said paper on December 13, 14, and 15, respectively, 1901, set out in the complaint as follows:

“Facts About Leghorn Matter.

Corrections of Articles Appearing in the Spokesman-Review of November 16.

The article published November 16th contained the following statement: ‘Postmaster Temple removed Fred Leghorn as his assistant because of an alleged shortage of \$100 in Leghorn’s accounts.’ The Spokesman-Review now ascertains that this was one of the causes contributing to his removal.”

The whole article appearing in the issues of the paper of December 13, 14, and 15 is as follows:

“Facts About Leghorn Matter.

Correction of Articles Appearing in The Spokesman-Review of November 16 and 17.

The Spokesman-Review has ascertained that the articles regarding the Leghorn shortage, published in the papers of November 16 and 17, should be corrected in the following particulars: The article published November 16 contained the following statement: ‘Postmaster Temple has removed Fred Leghorn as his assistant because of an alleged shortage of \$100 in Leghorn’s accounts.’ The Spokesman-Review now ascertains that this was one of the causes contributing to his removal. The same article said: ‘The shortage occurred, according to Mr. Temple, several months after Leghorn was appointed, which was in February, 1898.’ Leghorn was not appointed assistant postmaster until March, 1898. In the article published November 17 the following statement was made: ‘In checking up his accounts they found that he had abstracted \$100 from a special postal fund, and expended it on his private affairs.’ The fund from which the \$100 was abstracted was a special trust fund, deposited by a newspa-

per of this city with the postmaster, for the payment of postage on second class matter. In the same article the following appears: 'The inspector directed Postmaster Temple to remove Leghorn.' The facts were that the inspector pointed out to Mr. Temple the seriousness of such offense and the sacredness of the trust fund. The last mentioned article contained the following statement: 'And the fact that Leghorn's removal had been directed by the postoffice inspector for cause,' while the facts were as indicated in the preceding paragraph. The Spokesman-Review is glad to make these corrections. First, because it is always willing to correct any inaccuracies or errors which it may make. Second, because the law requires it shall do so."

The answer of the defendant admits the publication of the articles set out above, and alleges the truth of each of said articles in so far as they refer to the plaintiff; also that at the time of the publications the plaintiff was a candidate for appointment to the office of postmaster of the United States postoffice at Spokane, and was at said time deputy assessor of Spokane county, Washington; further, that after the publication of the article of November 17, 1901, the plaintiff notified defendant that the fund referred to therein was not a postal fund, but was a fund deposited with the postmaster for the purpose of securing the collection of postage upon second class mail matter, and also notified defendant that the said article was false and defamatory; that, in order to correct any erroneous, false, or defamatory matter in said article, defendant published the articles of the 13, 14, and 15 of December, 1901, within three days after notice of the mistake, and in as conspicuous a place and type as the original was published in, as required by the laws of 1899 (Laws 1899, p. 101); that said articles contain full and fair corrections of any and all mistakes and misappre-

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hensions occurring in the articles of November 17, 1901; and that each and all of said articles were true and published in good faith. The plaintiff's reply admitted that he was a deputy assessor of Spokane county when the articles were published, but denied all the other allegations of the answer. At the trial, after the plaintiff had introduced his evidence, the court, upon motion of defendant, granted a nonsuit as to the first cause of action, and denied a like motion as to the second, third, and fourth causes. These three last named causes were submitted to the jury, which returned a verdict in favor of the plaintiff for \$1,000. Thereafter plaintiff moved for a new trial as to the first cause of action, and the defendant moved for a judgment notwithstanding the verdict. The motion of plaintiff was denied, the motion of defendant for judgment notwithstanding the verdict was granted by the court, and the action dismissed. Plaintiff appeals from the judgment of dismissal.

The main question in the case is whether, under the pleadings and the proof, the court should have taken the case from the jury at the close of plaintiff's evidence by granting defendant's motion for nonsuit. The rule of law seems to be well settled that the truth of a matter published is a complete defense in a civil action of either slander or libel. Townsend, *Libel & Slander* (4th ed.), § 211; Odgers, *Libel & Slander* (Bigelow ed.) *p. 169; Newell, *Slander & Libel* (2d ed.), p. 651, § 68; 1 Jaggard, *Torts*, p. 521; 18 Am. & Eng. Enc. Law (2d ed.), p. 1067; *Haynes v. Spokane Chronicle Pub. Co.*, 11 Wash. 503 (39 Pac. 969).

The statute, at § 4994, Bal. Code, provides:

"In all cases tried in the superior court with a jury in which the legal sufficiency of the evidence shall be challenged, and the court shall decide as a matter of law what

verdict shall be found, the court shall thereupon discharge the jury from further consideration of the case, and direct judgment to be entered in accordance with its decision."

This court has frequently held the rule to be that where there is no conflict or dispute in the evidence, and where the evidence is certain and incontrovertible, and but one conclusion can be reasonably drawn therefrom, the question then becomes a question for the court, and not for the jury. In this case there is no conflict or dispute in the evidence. The plaintiff assumed the burden of proof, and introduced evidence to the effect that he was assistant postmaster of the Spokane postoffice from March, 1898, until October, 1899; that it was his duty, as assistant postmaster, to keep the books and accounts of the office, and in the absence of the postmaster, to perform the duties of the postmaster; that on June 14, 1898, he took \$100 from a fund in the possession of the postmaster, and applied it to his own private use; that the postmaster was away at the time; that, shortly after plaintiff had taken the money, a United States postoffice inspector came to inspect the office; that "he found a deposit made there as a cash bond by the Spokesman-Review for the purpose of securing the postmaster for trusting them, that I had taken \$100 out of it in the afternoon; and I told him I took it, and as soon as the bank opened in the morning I would refund it. I was unable to get the money from the bank that afternoon; the bank was closed before I got back from the house with my wife's signature to the note, and next morning, as the bank opened, I took the note to Mr. Cowley and got the money, and came back and put the money back there, and Mr. Linn [the postoffice inspector] and Mr. Temple [the postmaster] never asked me for it, and have not spoken to me about it from that day to this;"

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that the deposit from which the money was taken is permitted by the postal regulations; that credit can not be allowed by postmasters for mailing second-class mail matter, but the postmaster may require a deposit sufficient to cover the postage for a given time, and hold the money as security for the payment of the monthly bill for postage upon demand; that this money was deposited by the Spokesman-Review with the postmaster, Mr. Temple, for that purpose; that the postmaster came into the office a short time after the inspector had discovered the shortage, and plaintiff told him of it, whereupon the postmaster said: "That's all right." Plaintiff also testified that he had no right to take the fund, and that he knew it. He also testified that he was discharged by the postmaster several months after this occurrence, but that at the time of his discharge the matter of the shortage was not mentioned; that the real cause of his discharge was because the postmaster was paying him \$25 per month out of his own salary, and that by this discharge the postmaster saved this amount monthly. This was the evidence of the plaintiff himself. There was no dispute of these facts, and there is no room for two opinions therefrom. The four causes of action all rest upon the same ground, viz., the falsity of the publication. If the publication of the 17th of November, 1901, was true in fact, there is no liability against the defendant for that cause. The other three causes are based upon three publications which purport to be a correction of some minor points in the first publication. These three publications are not, and do not purport to be, "a full and fair retraction of any statement" in the publication of November 17th, but are, in effect, a reiteration of the truth of the original publication, with corrections in unimportant particulars. If there was no liability on ac-

count of the first cause, there can be none upon the others, for the truth of the last publication follows from the truth of the first. The matter complained of in the first publication is that the plaintiff "had abstracted \$100 from the special postal fund." The evidence of the plaintiff clearly and distinctly shows that he had, without right or authority, taken \$100 from the fund deposited with the postmaster for a special purpose, and this is substantially the charge of the publication. The charge in the publication is that "in checking up his accounts they found that he had abstracted \$100 from a special postal fund, and expended it on his private affairs." This is substantially what plaintiff himself says he did. The only possible difference between the testimony of plaintiff and the charge in the publication is that plaintiff says he took the money from a "deposit made there as a cash bond," while the publication says he abstracted it "from a special postal fund." While it is true that this money did not belong to the United States, except that part earned as postage, and was not a postal fund in the sense that it actually belonged to the United States, still it was held by the postmaster as security for a single purpose, viz., the payment of postage; and the testimony shows that the postmaster was authorized to take therefrom whatever was necessary to pay postage due the United States government, and for no other purpose. It was deposited with him to pay or insure the payment of such postage, and was, therefore, while it was on deposit with the postmaster, as much "a special postal fund" as a "deposit made there as a cash bond." It had no recognized name as a particular fund. The plaintiff described it by one name; the defendant, by another. Both meant the same fund. There is no substantial difference between the proof and the matter published. *Haynes*

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v. Spokane Chronicle Co., supra; Hall v. Elgin Dairy Co., 15 Wash. 542 (46 Pac. 1049).

Appellant argues that, to sustain the plea of the truth of the charge, respondent must prove "(1) that the \$100 was taken fraudulently and with felonious intent; and (2) that it was taken from a special postal fund"—in other words, that all the elements of the crime of embezzlement must appear. The rule seems to be that where a particular crime is charged, or where facts which constitute a crime are charged, then all the elements thereof must be proved as charged. In the publications complained of, there is no direct charge of a particular crime, but the facts themselves are stated. Conceding the rule to be as contended for by the appellant, we think the facts in this case, which appear from the evidence of the plaintiff himself, show all that is charged in the publication. He says he took the money, knowing the character and purpose of the fund, and that he had no right to take it. He used it to pay a private debt. He could not and did not return it until after discovery of the fact that he had wrongfully taken it. It is true, he intended to return it and did return it on the next day, but in the mean time his act had been discovered. If some misfortune had befallen him, as is frequent in cases of this character, so that he could not have borrowed the money to have replaced that taken, he could not have defended successfully against a prosecution for embezzlement during the time the money was not replaced. When it was shown that he had no right to take the money, and that he knew that fact, all the inferences which arise from a charge that the money was "*abstracted*" necessarily follow. We think the evidence in this case clearly shows the truth of the publications, not only as to the first but as to the other three causes of action, in so far

as the publications referred to the plaintiff, and that it was therefore the duty of the court to dismiss the action upon the motion of defendant at the close of plaintiff's case.

The judgment is therefore affirmed.

ANDERS and DUNBAR, JJ., concur.

FULLERTON, C. J., not sitting.

[No. 4488. Decided April 27, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. E. DUNHAM,
Appellant.

PHYSICIANS — PRACTICING WITHOUT LICENSE — SUFFICIENCY OF EVIDENCE.

In a prosecution for practicing medicine without a license a conviction was unwarranted, where the only evidence thereof was the advertisement in a newspaper as a doctor of a person of the same name as defendant, since the jury would not be justified in inferring therefrom, as against the presumption of innocence, either that the advertisement was authorized by defendant or that he was the person named therein.

Appeal from Superior Court, Lincoln County.—Hon.
CHARLES H. NEAL, Judge. Reversed.

Martin & Grant, for appellant.

N. T. Caton, Prosecuting Attorney, for the State.

The opinion of the court was delivered by

FULLERTON, C. J.—The appellant was convicted in the superior court of Lincoln county of the misdemeanor of having practiced medicine without a license, and sentenced to pay a fine of one hundred dollars and the costs of the prosecution. From the judgment and sentence he appeals.

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While many errors are assigned for reversal, we have found it necessary to notice but one, namely, that the evidence was insufficient to justify a verdict of guilty. The acts constituting the practice of medicine charged against the appellant were that, at a certain time and place, he "did wrongfully and unlawfully establish and maintain an office, and advertise the title of doctor" in a certain newspaper. Of these acts there is no evidence in the record whatever. No attempt at all was made to prove that the defendant maintained an office, and the only evidence introduced as to the other fact was the following (we quote from the record):

"In the absence of witness a paper containing the following 'ad.' introduced. The Creston News of September 20, 1901.

'Dr. E. Dunham. Special attention given to heart and lungs. Consultation free. Office at Drug Store. Creston, Wash.'"

Clearly, there is here no proof of the crime charged. As against the presumption of innocence, it cannot be presumed from the mere fact that the advertisement appeared in a paper that it was authorized by the appellant, nor will it be presumed that he was the person named in the advertisement, though the name therein and his name be the same. Without the aid of such presumptions, there is no evidence in the record of guilt, and hence no evidence upon which a jury could found a verdict of guilty.

The judgment is reversed, and the cause remanded, with instructions to discharge the defendant.

ANDEES, DUNBAR and MOUNT, JJ., concur.

[No. 4502. Decided April 27, 1908.]

T. N. HENRY *Respondent*, v. COUNTY OF THURSTON, *Appellant*.

CONSTITUTIONAL LAW — APPELLATE JURISDICTION OF SUPREME COURT
— VALIDITY OF STATUTE.

Where the supreme court obtains jurisdiction of an appeal in an action in which the original amount in controversy does not exceed the sum of \$200, merely because of the fact that the validity of a statute is put in issue as to one of several causes of action included in the complaint, its jurisdiction extends only to the cause of action affected by the statute.

SAME — EQUAL PRIVILEGES — MILEAGE OF COUNTY SUPERINTENDENTS.

Section 8 of the act of March 19, 1901 (Laws 1901, p. 377) authorizing county superintendents to charge five cents mileage in counties of the first to the tenth classes inclusive and ten cents mileage in all counties having a higher class number than the tenth, does not violate art. 1, § 12, of the state constitution, which prohibits the passage of laws granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all.

SAME — EQUAL PROTECTION OF THE LAWS.

Such a law cannot be said to operate unequally, and therefore in violation of the fourteenth amendment of the United States constitution, in the absence of a showing that the cost of travel is the same in all counties.

Appeal from Superior Court, Thurston County.—Hon. OLIVER V. LINN, Judge. Affirmed.

George H. Funk and Vance & Mitchell, for appellant.

Troy & Falknor, for respondent.

The opinion of the court was delivered by

FULLERTON, C. J.—The respondent, who was county superintendent of common schools of Thurston county, brought this action against the county to recover the sum

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of \$126.05, being the aggregate of several items set forth in the complaint in seven distinct causes of action. After a demurrer had been interposed and sustained to the second and third causes of action, an answer was filed to the remainder, denying on information and belief the allegations of fact therein contained. An affirmative defense was also set up to the first cause of action, which was a claim for mileage for visiting the common schools of Thurston county, to the effect that an unnecessary number of miles had been traveled in visiting the schools, and ~~also that the act of the legislature on which the claim was~~ founded was unconstitutional and void. On the trial, which was had before the court and a jury, the respondent waived any right to recover upon his seventh cause of action. At the conclusion of the respondent's case in chief the appellant moved for nonsuit against the respondent, which being overruled, it announced that it would submit its case to the jury on the evidence introduced by the respondent. The respondent thereupon moved the court to instruct a verdict in his favor, which the court did, instructing the jury to find for the plaintiff in the sum of \$62.40, being the aggregate of his first, fourth, fifth, and sixth causes of action. Judgment was afterwards entered on the verdict, from which this appeal is taken.

The article of the constitution defining the appellate jurisdiction of this court provides that "its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property, does not exceed the sum of two hundred dollars (\$200), unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute." Constitution, art. 4, § 4. It will be observed that

the amount in controversy between the parties is insufficient to bring the action within the appellate jurisdiction of this court, and that the action is appealable only because the appellant questions the validity of the statute upon which the first cause of action is founded. The first important question, therefore, is, how much of the cause is before this court for review? The appellant insists that inasmuch as the court has jurisdiction of the action for one purpose, it has it for all purposes, and will inquire not only into the validity of the statute assailed, but into the other errors assigned upon the appeal, whether or not they are involved with the question which gives it jurisdiction, and regardless of its conclusion on that question. On the other hand, the respondent contends that the court has jurisdiction only so far as the validity of the statute and that part of the judgment of the trial court necessarily dependent thereon is concerned, and that, if the court finds the statute constitutional, its inquiry is ended, while, if it finds the statute unconstitutional, it will modify the judgment of the lower court only in so far as it finds that the unconstitutionality of the statute affects the judgment. The respondent's contention, we think, must be sustained. Plainly, it was the purpose of the framers of the constitution to make the superior courts the final arbiters on all questions when the amount in controversy does not exceed two hundred dollars, unless those questions are dependent on the legality of a tax, etc., or the validity of a statute. Any other construction would practically nullify the limitation. If a party may in cases under the jurisdictional amount have all the questions involved reviewed by alleging that some one of them depends on the validity of a statute or the legality of some of the especially enumerated causes, there are but few cases that this court is not en-

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titled to review, as they can be brought here by merely assailing a statute supposed to be involved. This, we repeat, is not the meaning of the constitution. It intended that questions not involving or dependent on the validity of a statute, or the legality of a tax, impost, assessment, toll, or municipal fine, should be finally adjudicated in the superior courts, unless the amount in controversy exceeded two hundred dollars.

The section of the statute which is claimed to be unconstitutional is § 8 of the act of March 19, 1901. (Session Laws 1901, pp. 370, 377.) It reads as follows:

“For each mile actually and necessarily traveled in the performance of their official duties and in attendance on the convention of county superintendents, called by the Superintendent of Public Instruction, county superintendents shall be allowed mileage as follows: In each county of the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth classes, five cents per mile; in each county of the eleventh class and all counties having a higher class number than the eleventh, ten cents per mile; Provided, That no county superintendent shall be allowed to charge or collect any fee for the performance of any other duties herein named; Provided further, That no constructive mileage shall be charged.”

The act is said to be unconstitutional because of the difference made in the mileage rates. The specific provision of the state Constitution which is said to be violated by this act is § 12 of art. 1, which prohibits the legislature from passing a law granting to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all. We cannot think, however, that this clause of the Constitution has any reference to laws like the one in question. The law was intended to provide a means by which superintendents of the common schools could be reimbursed for the expenses

incurred by them in the performance of a specific duty which the law especially enjoined on them. It may be that the legislature did not adopt the best method of accomplishing the object intended, or it may be that the law operates unequally in some instances, but it is not for these reasons a grant of a privilege or immunity within the meaning of those terms as used in the Constitution, and hence this provision cannot apply.

It is said also that the act is violative of the fourteenth amendment to the Constitution of the United States, in that persons affected by it are not treated alike under like circumstances and conditions. Conceding, without deciding that this provision of the federal constitution is applicable to a case of this kind, we cannot concede that it is conclusive of the question here. The legislature, instead of providing that the several officers should be reimbursed for their actual traveling expenses, had a right to prescribe that they should receive fixed mileage rates in lieu thereof. *Gox v. Holmes*, 14 Wash. 255 (44 Pac. 262). Whether the rates fixed operate equally or unequally must depend on circumstances; if, for example, the cost of traveling in counties from the first to the tenth class, inclusive, is only five cents per mile, while in the eleventh class and all counties having a higher class number than the eleventh it is ten cents per mile, then the law does not operate unequally; while, if the cost is the same in all the counties, it does so operate. But these are matters which the court cannot know judicially, and the legislative finding thereon must be deemed conclusive, at least in the absence of a showing to the contrary, of which there is none in the case before us.

As we find no error in the record which we are empowered to review, the judgment appealed from will stand affirmed.

MOUNT and ANDERS, JJ., concur.

REFORMED PRESBYTERIAN CHURCH v. McMILLAN. 643

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Syllabus.

[No. 4526. Decided April 27, 1903.]

REFORMED PRESBYTERIAN CHURCH OF NORTH AMERICA,
Appellant, v. **CHRISTOPHER McMILLAN, Executor, Re-**
spondent.

**WILLS — CONSTRUCTION — JURISDICTION OF SUPERIOR COURT SITTING
IN PROBATE.**

A superior court sitting in probate has jurisdiction to entertain a proceeding to construe a will, as such courts are not shorn of their general powers conferred by the constitution by the further provision vesting them with jurisdiction "of all matters of probate," so as to restrict their jurisdiction to that of probate courts when acting as such.

SAME — DETERMINATION OF DISTRIBUTES.

Semble, that under Bal. Code, § 6355, which makes it the duty of the superior court sitting in probate, upon the settlement of the final account, to distribute the estate among the persons who are by law entitled thereto, the court may determine who are entitled to the property.

SAME — ACTION BY DEVISEE — LIMITATIONS.

One claiming to be named in a will as a devisee has a right to maintain an action to establish such claim at any time before final distribution, regardless of the statute of limitations.

SAME — DEPOSITIONS — POWER OF COURT TO ISSUE COMMISSIONS.

The superior court has power to issue a commission to take depositions of witnesses in a proceeding in probate pending before it, either under the provisions of Bal. Code, § 6017 (Pierce's Code, § 979), authorizing testimony to be taken by deposition to be read in evidence in actions or proceedings pending in any court, or under Pierce's Code, § 2333, which expressly authorizes a probate court to issue a commission to take the depositions of witnesses.

SAME — DESIGNATION OF DEVISEE — DEFECTIVE DESCRIPTION.

The intent of a testator to make a devise to the "Reformed Presbyterian Church of North America, General Synod", although the will recited the devise as in favor of the "Board of Directors of the Society for Disabled Ministers of the Reformed Presbyterian Church of Illinois", is evident from the fact that there was

no such body in existence as the devisee named; that the testator was a member of the Reformed Presbyterian Church of North America, whose governing body was the General Synod; that he had belonged to a congregation thereof in Illinois prior to his removal to the state of Washington and all his life had taken great interest in that organization; that on the occasion of his last visit to his old home and church in Illinois the General Synod had recently established a fund for the relief of disabled ministers, which it had put in charge of a "Committee on Disabled Ministers' Fund"; that collections were being taken in the churches at that time for the purpose; and that the subject was a matter of interested discussion among his relatives whom he was then visiting, a former minister of the congregation to which the testator had belonged being one of the beneficiaries of such fund.

SAME — PAROL EVIDENCE.

Parol evidence is admissible for the purpose of removing the latent ambiguity occasioned by the defective designation of the devisee, where there are words of designation, but a mistake in the name.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM O. CHAPMAN, Judge. Reversed.

Frank A. Luse (*Nathan R. Park*, of counsel), for appellant.

Frederick H. Murray, for respondent.

The opinion of the court was delivered by

FULLERTON, C. J.—Archibald McMillan died in Pierce county, state of Washington, on the 15th day of May, 1893, leaving a will, in which he made, among others, the following bequests:

"I devise and bequeath in trust for the use of my dear wife, for and during the period of her natural life, all my right, title and interest, as long as she may remain unmarried, to all my personal estate, whether in my name, possession or otherwise, to be held by my hereinafter named executors or their successor in trust for her, to be

invested by them as to them may seem best, and the proceeds rents and profits to be given her for her disposal as she may desire; and I devise and bequeath in trust for my dear wife for and during the period of her natural life, all my right, title and interest, as long as she remains unmarried, to all my real estate of whatever name and description, to be held by my hereinafter named executors or their successors in trust for her during her natural life and the proceeds, rents and profits thereof to be given her for her disposal as she may desire.

"And upon her death, or marriage, I direct that the personal estate, goods and chattels shall be distributed or divided in the following manner, that is to say.

"SECOND—I hereby devise and bequeath in trust to the Board of Directors of the Society for Disabled Ministers of the Reformed Presbyterian Church of Illinois the sum of two thousand five hundred (2,500) dollars to be paid by my executors hereinafter named or their successors out of my personal estate and to be vested by said board perpetually, as to them may seem best, the proceeds, rents and profits thereof to be expended for the comfortable maintenance of the disabled ministers in the care of said society, and in case that the said proceeds, rents and profits cease to be so applied, then the said principal sum of two thousand five hundred (2,500) dollars to immediately revert or be paid to the issue of my body or their heirs."

The will was admitted to probate on the 29th day of May, 1893. The executor named in the will duly qualified, and entered upon the duties of his trust, and was acting thereunder on the 20th day of November, 1893, when the wife of the testator died. Thereafter the executor sought for the legatee above named, but was unable to find any association of persons or corporation in the state of Illinois which bore the name designated, and thereupon proceeded to wind up the estate, assuming that the bequest was void because of a misdescription of the person or body intended as trustee. On the 10th day of January, 1902,

the day set for hearing the petition for final distribution of the estate, the appellant, The Reformed Presbyterian Church of North America, General Synod, appeared and filed a claim for the bequest, averring that the bequest was intended for it. An answer was filed to the application raising issues of fact on which a hearing was had, at the conclusion of which the court found that the appellant was not the trustee named in the will, and that the bequest was not intended for it; that the trustee named had no existence in fact; and consequently, that the bequest reverted to the heirs at law of the decedent, and directed that it be distributed accordingly. This appeal is from that decree.

Before passing to the contention of the appellant, it is proper to notice some of the reasons urged by the respondent for an affirmance of the judgment appealed from, regardless of the merits of the controversy or the grounds upon which the trial court rested its decision. The first contention is that the proceeding was one to construe a will, and that a superior court sitting in probate is without jurisdiction to entertain a proceeding for that purpose. By statute (§ 6355, Bal. Code) it is made the duty of the court sitting in probate upon the settlement of the final account to distribute the estate among the persons who are by law entitled thereto. This statute, we think, confers upon the court jurisdiction to determine who are entitled to the property, as the power to distribute includes the power to determine to whom distribution should be made. But, if this were not so, the court has inherent power to determine the question, and this in a probate proceeding on the application of one claiming to be an heir or legatee. The Constitution does not make the superior courts probate courts. On the contrary it vests the superior courts

with jurisdiction "of all matters of probate"; hence the court is not shorn of its general powers simply because the cause before it may be one which was cognizable formerly in a court of probate. It possesses in every case and at all times its powers as a court of superior and general jurisdiction, and among these is the power to hear and determine the question to whom a bequest made by a decedent rightfully belongs. A statute, therefore, can neither add to nor take away the power, and it is immaterial to inquire whether or not one conferring such a power is in existence.

It is next contended that the appellant's claim, as it was not made until more than six years after the death of McMillan, was barred by the statute of limitations. If we understand the argument upon this point, counsel do not contend that the executor holds adversely to the legatees *named* in the will, or that the statute of limitations would run against them while the estate was in the hands of the executor in the course of administration, no matter how long continued, but that it does run against any one *not so named*; and that in the case before us the appellant cannot be considered as one named in the will, as it requires extrinsic evidence to enable the court to recognize it. It would seem, however, that no such distinction could exist as the one here sought to be made. If the appellant is not named or described in the will, then clearly it has no right to the legacy at all, and no amount of extrinsic evidence can create a right for it. On the other hand, if it is named or described in the will, no matter how defective its designation may be, it stands on a footing with all other devisees, and any circumstance which will prevent the statute from running as to them, will prevent the statute from running as to it. An executor of an estate holding as such does not,

of course, hold adversely to the heirs or devisees thereof; hence no mere delay in closing up the estate, no matter how long continued, can operate to vest title in him to the exclusion of such heirs or devisees.

For the purpose of showing its right to the bequest, the appellant introduced the depositions of several witnesses taken upon commissions issued out of the superior court in this proceeding, and it was contended in the court below and is contended here that the court was without authority to issue such commissions, and that the evidence taken thereon was not properly before the court. The Code (Pierce's, § 979) provides that "the testimony of a witness may be taken by deposition, to be read in evidence in an action, suit or proceeding commenced and pending in any court in this state," when certain conditions exist, of which no question is made here. This is authority ample to authorize a superior court to issue a commission to take the depositions of a witness in a proceeding in probate pending before it, even if it be necessary to find statutory authority for the issuance of such a commission. In addition to this, there is a statute which expressly authorizes a probate court to issue a commission to take the deposition of witnesses; and, if it were true that the superior court, when hearing matters of probate, has only the powers of the former territorial probate courts, that statute would authorize the issuance of a commission to take depositions. Code 1881, § 1316; Pierce's Washington Code, § 2333.

The evidence discloses that the Reformed Presbyterian Church of North America, General Synod, is a religious denomination, having a presbyterian plan of church government. The highest governing authority is the General Synod, which meets yearly at stated places selected in ad-

vance. The General Synod is composed of delegates from the various presbyteries, which in turn are composed of all the ministers of a specified district, together with one ruling elder from each congregation within the district. The ruling elders are elected by the congregations, usually for life or during membership in the congregation. The church has a well recognized form of worship. It maintains church buildings and other meeting places. It maintains such a body of ministers as the needs of the church require, and its ability permits. At a meeting of the General Synod in 1886 it established a fund for the relief and maintenance of superannuated and disabled ministers, putting it in charge of a committee called the committee on Disabled Ministers' Fund. This committee was first appointed at the General Synod in 1886, and has been regularly reappointed every year since. It reports to the General Synod, and takes care of and relieves such of the ministers of the church as the General Synod directs. The chief source from which the committee obtains funds is collections taken up in the various congregations of the church, though money is often obtained by specific gifts from the charitably inclined, and at least one bequest has been made and paid into the fund since its establishment.

The decedent, prior to the time he came to the Pacific Coast, was an active member of the Reformed Presbyterian Church, General Synod, belonging to a congregation located near Sparta, Illinois, in which his father was a ruling elder, and with which he had been actively identified since his early youth. Whether he ever formally segregated his membership from this congregation does not appear. It does appear, however, that he never subsequently lived where there was another congregation having his own particular faith, and that he never formally joined

any other denomination. It was shown also that he visited his old home twice after he removed therefrom—once in 1876, and again in 1887 or 1888. At each of these visits, so his aged sister-in-law and his nephew testify, he expressed great interest in the old church, and was anxious concerning its welfare; the first witness saying: "He was raised in the church as was also his father; . . . he loved the church and was anxious that it should prosper." At the time of his second visit the church had just established its Disabled Ministers' Fund. Collections were then being taken for the support of certain disabled ministers, one of whom was formerly minister of the congregation to which the decedent had belonged, and the matter was then being agitated among his relatives with whom he was then visiting, and who were members of the church.

In the light of these circumstances, it seems to us that the bequest should go to the claimant. Even if the trustee named had no existence in fact, it would not alone be a sufficient reason for allowing the bequest to lapse. A bequest is never allowed to lapse for the want of a trustee, and if it be in fact the disabled ministers of the appellant church who were intended by the decedent to be the recipient of his bounty, the court can appoint a trustee, and charge it with the duty of administering the trust. But we cannot think there is any doubt who was intended to be named as trustee, or who were intended as the beneficiaries of the trust. Manifestly, the former was the committee having in charge the Disabled Ministers' Fund of the appellant church, and the latter the disabled ministers of that church. The words of the bequest, when interpreted by the surrounding circumstances and the situation in which the testator stood towards the objects of his charity, admit of no other

conclusion. The church he named was the church in which he was reared; it was the church of his father. Connected with it were not only his earliest, hence fondest, recollections, but in his faith in its teachings lay his hope of another and better life. Certainly to it, and to no other, would his memory turn when he sought to dispose of his worldly goods by an instrument which could take effect only after his death. That he did not remember accurately the name of the particular body which had in charge the fund is not strange. Among his own church people the names used to designate it would doubtless be rather descriptive than technical, and if he ever knew its exact title, he could scarcely be expected to remember it for the length of time intervening between his last visit and the date of the will. But this is not very material. He knew such a body existed, and the language of the bequest used to designate the trustee is rather a description than a name, and, treating it as such, it sufficiently describes the body of the appellant church having in charge the fund for its disabled ministers.

That parol evidence is admissible to explain a latent ambiguity in a will as well as in other writings is abundantly sustained by the authorities. As was said by the court in *Newell's Appeal*, 24 Pa. St. 197.

“ . . . it has always been held that a defective designation of the devisee or legatee intended may be repaired by parol proof. If the person to take be not in some sort described in the devise, evidence will not be admitted to show who was intended, for that would be to make a will by parol; but where there are words of designation, though a mistake of the name, the ambiguity may be removed by evidence *dehors* the will. This is a well settled rule in respect to devises in general, and it is peculiarly applicable to charitable bequests made to religious corporations.”

See also, *Taylor v. Horst*, 23 Wash. 446 (63 Pac. 231); *Cross v. Cross*, 23 Wash. 673 (63 Pac. 528); *Woman's Foreign Miss. Society v. Mitchell*, 93 Md. 199 (48 Atl. 737, 53 L. R. A. 711); *Hinckley v. Thatcher*, 139 Mass. 477 (1 N. E. 840, 52 Am. Rep. 719); *Reilly v. Union Protestant Infirmary*, 87 Md. 664 (40 Atl. 894).

The judgment is reversed, and the cause remanded, with instructions to enter an order directing the bequest to be paid to the appellant.

MOUNT, DUNBAR and ANDERS, JJ., concur.

[No. 4557. Decided April 27, 1903.]

THE STATE OF WASHINGTON *on the Relation of O. Dean et al., Respondents*, v. GEORGE B. LAMPING, *as Auditor of King County, Appellant*.

COSTS — LIABILITY OF COUNTY — INVALID ATTEMPT OF SUPERVISOR TO COLLECT POLL TAX.

An action by a road supervisor, under Bal. Code, § 3822, to enforce the payment of a road poll tax is a proceeding in behalf of the county, and hence where a judgment obtained by the road supervisor before a justice of the peace is vacated and set aside in the superior court, a judgment against the county for costs is warranted, inasmuch as the failure to obtain a valid judgment cannot be imputed to the justice and supervisor as a tort, so as to exonerate the county from liability.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Affirmed.

Walter S. Fulton and Frank S. Griffith, for appellant.
J. W. Heffner, for respondents.

Apr. 1903.] Opinion of the Court.—FULLERTON, C. J.

The opinion of the court was delivered by

FULLERTON, C. J.—This is a proceeding in mandamus, brought to compel the appellant, who was county auditor of King county, to draw a warrant on the county treasurer in satisfaction of a judgment. The facts are these: On July, 1902, one James Balkwell, who was then road supervisor of road district No. 84 of King county, instituted proceedings under § 3822 of the Code (Ballinger's) before Warren S. Slocum, justice of the peace in and for Martin Creek precinct in King county, to recover from the relator, O. Dean, a sum claimed to be due from him to King county as road poll tax. In the same proceeding the relator the Skykomish Lumber Company was summoned to answer as garnishee, and thereafter such proceedings were had as to result in a judgment against both relators in the sum of ten dollars in favor of road district No. 84. Later the relators sued out a writ of review in the superior court of King county, directed to the justice of the peace and the road supervisor, commanding them to certify a transcript of the proceedings to that court, that the proceedings might be reviewed therein. On a hearing had on a return to the writ, the superior court set the justice's judgment aside, and entered a judgment against road district No. 84 for the costs of the proceedings, amounting to the sum of \$18.15. The relators thereupon satisfied the judgment of record, and presented a certified transcript thereof to the appellant, and demanded a warrant upon the county treasurer for the amount thereof. The county auditor refused to issue the warrant, whereupon the relators instituted this proceeding to compel him to do so. The superior court granted the writ, and this appeal is from its order.

The only question urged on the appeal is the liability

of the county for the costs incurred in vacating the judgment of the justice's court. The appellant argues that justices of the peace and road supervisors are public officers having duties conferred upon them by law, over which the county government has no control, and that the county is not, therefore, liable for their wrongful or negligent acts; arguing further that the failure of the justice of the peace and road supervisor to obtain a valid judgment was a wrongful act on their part, for which the county is not liable. We cannot assent to this contention. It is the rule that a quasi-municipal corporation, like a county, is not liable in damages for the misfeasance, laches, unauthorized exercise of power, or other tort of its public officers, not authorized nor ratified by it; but that is not the question here. The action contemplated by § 3822, *supra*, is one in which the county is the real party in interest, and should be the party plaintiff. The proceeding is instituted on its behalf, and any judgment recovered in such proceeding inures to its benefit. It is true, the proceeding may be instituted by a road supervisor, independent of the officers of the county on whom that power and duty is usually devolved, but it is none the less for that reason a proceeding by the county. The legislature may put into the hands of such county officers as it pleases the power and duty of commencing proceedings on behalf of the county, and, when it puts this power in the hands of a road supervisor, his exercise of the power is just as much the act of the county as is the same power when exercised by any other county officer; hence his acts in that behalf even though unsuccessful, are not torts, in the sense that liability for the costs therefor does not fall upon the county.

The judgment is affirmed.

MOUNT, DUNBAR, and ANDERS, JJ., concur.

Apr. 1903.]

Opinion Per Curiam.

[No. 4624. Decided April 28, 1903.]

F. V. PIERCE, *Appellant*, v. COMMERCIAL INVESTMENT
COMPANY *et al.*, *Respondents*.

APPEAL — DISMISSAL — FAILURE TO SERVE NOTICE ON SURETIES.

An appeal from a judgment on a cost bond will be dismissed, where the sureties on the bond have not joined in the appeal nor been served with notice of the appeal.

Appeal from Superior Court, Pierce County.—Hon. JOHN C. STALLCUP, Judge. Appeal dismissed.

Stanton Warburton, for appellant.

T. O. Abbott, for respondents.

PER CURIAM.—This is an action for revival of a judgment. On motion of defendants, the cause was dismissed by the lower court. When the plaintiff made his motion and petition for revival of the judgment, the court required him to give a cost bond, on the ground that plaintiff had removed from the state of Washington subsequently to the obtaining of the judgment, and the judgment from which this appeal was taken was rendered against the plaintiff and the sureties on said bond. The respondents move to dismiss the appeal, for the reason, among others, that no notice of appeal was given to or served upon the sureties on said bond. This motion will have to be sustained, under the rule announced in *Cline v. Mitchell*, 1 Wash. 24 (23 Pac. 1013), *Carstens v. Gustin*, 18 Wash. 90 (50 Pac. 933), and *State ex rel. Billings v. Port Townsend*, 27 Wash. 728 (67 Pac. 1135). This being a jurisdictional question, it is not necessary to discuss the other grounds alleged in the motion.

The appeal is dismissed.

[No. 4633. Decided April 28, 1903.]

JERRY S. ROGERS, *Respondent*, v. JOHN TRUMBULL, *Appellant*.

APPEAL — MOTION TO DISMISS — NOTICE OF MOTION — SUFFICIENCY OF SERVICE.

A certificate of service of a motion upon the attorney for defendant to the effect that the sheriff, having made diligent search for such attorney without being able to find him at his usual place of abode or anywhere else, had duly served the motion on said attorney by leaving a copy thereof under the door of a room which he believed to be the office of said attorney, is not a sufficient showing of service.

SAME — TIME OF SERVICE.

A motion to dismiss an appeal will not be considered, where the appellant has not had the ten days' notice required by the supreme court rules in such cases.

Appeal from Superior Court, Jefferson County.—Hon. GEORGE C. HATCH, Judge. Motion to dismiss denied.

Trumbull & Trumbull, for appellant.

A. W. Buddress, for respondent.

PER CURIAM.—A motion is made to dismiss the appeal in this case for the reason (1) that the appeal was not taken within the time provided by law; (2) that no copy of the appeal bond has been served. The appellant objects to taking up the motion at this time, for the alleged reason that he has not had the ten days' notice provided by rule 18 of this court. The notice would have been in time to have secured a hearing on the 27th of March, the day on which the appellant was cited to appear and answer the motion to dismiss, had it been filed as early as the 17th of March. The sheriff of Jefferson county certifies that he received said notice on the 17th; that he made due and

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Opinion Per Curiam.

diligent search and inquiry to find A. H. Sawyer, one of appellant's attorneys, who resides in the city of Port Townsend, but that he was unable to find him at his usual place of abode or anywhere else; and that thereupon, on said 17th day of March, 1903, he duly served said motion and notice on said Sawyer by leaving a copy thereof under the door of a room in a building on Water street in said city of Port Townsend, which he believed to be the office of said Sawyer. This, we think, is not a sufficient showing of service. In addition to this, the affidavit of attorney Sawyer is to the effect that the first intimation he had of any motion to dismiss the appeal was on the morning of the 18th day of March, when a paper purporting to be such motion to dismiss said appeal was handed to him by H. Ballinger, at Ballinger's office, in the city of Port Townsend, and that at all of said times the attorneys for the respondent in said cause had actual knowledge of his said place of residence and of his said office. The affidavit of John Trumbull, the appellant, and one of the attorneys for the appellant, is to the effect that the notice was served upon him on the 18th day of March, by A. W. Buddress, attorney for the respondent; that the said Trumbull acknowledged the receipt of said copies as of the 18th day of March, on the original of said notice and motion, and signed the names of Trumbull & Trumbull and A. H. Sawyer to such acknowledgment; that this was the only service of such notice and motion upon the affiant or upon the firm of Trumbull & Trumbull. This affidavit is corroborated by the record, where, on the original notice, is found the following indorsement: "Copy of the foregoing motion and notice received this 18th day of March, 1903. (Signed) Trumbull & Trumbull and A. H. Sawyer, attorneys for appellant."

The appellant is entitled, under the rule, to ten days, and can not be compelled to discuss the matters at issue in the motion in less time. The motion is denied.

[No. 4469. Decided April 29, 1903.]

THOMAS J. CLARK, *Respondent*, v. GREAT NORTHERN
RAILWAY COMPANY *et al.*, *Appellants*.

CARRIERS — EJECTING PASSENGER — BREACH OF CONTRACT — TORTIOUS
ACTS — MISJOINDER OF CAUSES — DEMURRER.

In an action against a railway company and its conductor for the ejection of a passenger from a train, the complaint is demurrable for misjoinder of causes of action, when one cause is founded upon the alleged breach of contract of carriage and another cause is founded on the acts of the conductor and other employees in bruising and mutilating plaintiff in ejecting him from the train with unnecessary force and violence.

SAME — PARTIES.

Where the conductor on a railway train, acting as agent for the company, refuses to comply with the terms of the contract of carriage held by a passenger, the company, and not the agent, is liable for the breach, and therefore his joinder as defendant would subject the complaint to demurrer.

SAME — NONSUIT AS TO ONE CAUSE — ELIMINATION OF EVIDENCE IN
SUBMITTING REMAINING CAUSE TO JURY.

In an action for damages for ejecting a passenger who was attempting to ride upon a scalper's ticket in which the complaint set up as causes of action the breach of contract of carriage and the tortious acts of the company's employees in forcibly ejecting plaintiff, and, after the evidence was in, the plaintiff was nonsuited as to the first cause of action, in support of which evidence had been admitted tending to show that the company had waived the conditions against transfer of tickets from the original purchaser, had encouraged the scalping of tickets, and had recognized them on its trains, it was error for the court to refuse to instruct the jury to disregard such evidence, since it was immaterial on the only issue remaining—the question of whether more

31	658
34	76
34	360
31	658
37	538
31	658
40	47

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force than was necessary had been used in putting plaintiff off the train.

Appeal from Superior Court, Spokane County.—Hon. A. G. KELLAM, Judge *pro tem*. Reversed.

Will H. Thompson, M. J. Gordon and W. W. Hindman, for appellants.

Barnes & Latimer, for respondent.

The opinion of the court was delivered by

MOUNT, J.—On November 11, 1900, the respondent purchased what is commonly known as a “scalper’s” railway ticket from a broker in Spokane. This ticket had been issued by the Great Northern Railway Company in West Superior, Wisconsin, to one I. Norwick, for passage to Spokane, and return. Mrs. Norwick had used the ticket in coming to Spokane, where she sold it to a broker, who sold it to the respondent. Respondent, on the date named, got upon appellant’s train at Spokane, bound for St. Paul, Minnesota. After the train had gone two or three miles out of Spokane on its easterly trip, the respondent presented the ticket to a ticket collector on the train. The ticket collector refused to receive the ticket on the ground that it was not good for respondent’s passage. Respondent refused to leave the train or pay his fare. Whereupon the conductor, who is made a defendant in this case, ordered him off the train at Hilliard, being the next station east of Spokane. Respondent refused to go, and stubbornly held on to the seat of the car, so that the conductor could not put him off. The conductor thereupon called to his assistance three other employees of the railway company, who by force ejected the plaintiff from the train. In some way, when plaintiff was put off, he either fell or was thrown to the platform, and was injured. He brought

this action to recover damages for injuries sustained by reason of his ejection from the train. Upon a trial the jury returned a verdict in his favor. From a judgment entered thereon the defendants appeal.

Appellants allege that the court erred in overruling the demurrer to the complaint, in refusing to give an instruction requested by the defendants, in permitting counsel for respondent to make certain comments in addressing the jury, and in denying the motion for a new trial. It will be necessary to consider only the first two errors assigned. The complaint sets out two causes of action. The first cause is predicated upon an alleged contract between the railway company and respondent. The third paragraph of the complaint is as follows:

"That on the 11th day of November, A. D. 1900, plaintiff, then being in the city of Spokane, in the state of Washington, and desiring and intending to go to the city of St. Paul, in the state of Minnesota, for that purpose did purchase and become the owner of one passenger ticket issued by the defendant railway company upon and over its said line of railway from the said city of Spokane to West Superior in the state of Wisconsin, by way of said city of St. Paul, and entitling plaintiff as the owner and holder thereof to passage and transportation as a passenger in the cars and upon the regular passenger trains of the defendant railway company, operated by it upon and over its said line of railway from the said city of Spokane to the said city of St. Paul, and on said day, plaintiff being the owner and having in his possession said railway passenger ticket, went upon one of the regular passenger trains of defendant railway company as a passenger at its depot in the said city of Spokane and entered one of the cars of said passenger train, and being operated by defendant railway company upon and over its said line of railway between said city of Spokane and said city of St. Paul, and then about leaving the said city of Spokane

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for and on its way to the said city of St. Paul, for the purpose of being transported as such passenger by the defendant railway company upon said train from the said city of Spokane to the said city of St. Paul, and then and there became and was a passenger on said train. That it then and there became and was the duty of the defendant railway company and its agents and servants on said train to receive and safely transport plaintiff as such passenger on said train over its said line of railway, from said city of Spokane to said city of St. Paul."

The complaint then proceeds to set out that the conductor wrongfully and unlawfully refused to receive the ticket, and demanded that respondent pay his fare, and, upon the refusal of respondent to do so, the conductor and other agents of appellant wrongfully ejected the respondent from the train. Then follows a description of the manner of the ejection, and the injuries which respondent suffered, and the indignities, shame, and disgrace to the respondent. Damages are claimed in the sum of \$15,000. The second cause of action alleges, in substance, that the respondent purchased a ticket which in good faith he believed entitled him to be carried on appellant's train from Spokane to West Superior, Wisconsin; that he went upon appellant's train at Spokane; whereupon defendant Willerton and other agents of appellant company refused to accept said ticket, but demanded fare from respondent, or that he leave the train, which demand respondent refused to comply with, believing in good faith that the ticket was valid, and entitled him to be carried as a passenger; that appellant Willerton and other agents of appellant company, then and there acting under instructions of appellant company, unnecessarily and with excessive force and violence ejected respondent from said train and wantonly, unlawfully, and recklessly did beat, bruise, and mutilate respondent. Then follows a description of the injuries

inflicted upon respondent, substantially the same as in the first cause of action, and demand for damages in the sum of \$15,000. The prayer of the complaint is for \$40,000, being \$15,000 for each of the causes of action and \$10,000 exemplary damages. The appellant interposed a demurrer to the complaint upon the following grounds: (1) Defect of parties defendant; (2) improperly uniting several causes of action; (3) insufficiency of facts to constitute a cause of action. We think this demurrer should have been sustained upon the second ground stated. It is readily seen that the first cause of action is based upon a violation of contract of carriage; that the second cause is based upon the alleged tort of the company and its agent Willerton in removing respondent from the train, using excessive force and violence therein. The statute regulating the joinder of causes of action in this state (§ 4942, Bal. Code) is as follows:

"The plaintiff may unite several causes of action in the same complaint, when they arise out of,—(1) Contract, express or implied; or (2) injuries, with or without force, to the person; . . . But the causes of action so united must affect all the parties to the action, and not require different places of trial, and must be separately stated."

This statute does not authorize the joinder of causes *ex contractu* with causes *ex delicto* in the same complaint. *Magee v. Oregon Ry. & Nav. Co.*, 46 Fed. 735. It merely authorizes the joinder of causes of like character; that is, any number of causes upon contract may be united in one complaint when the parties and the places of trial are the same. So also any number of causes of action for injuries with or without force, where the parties and places of trial are the same, may be united in one complaint. But actions on contract cannot be united with actions in tort. 3 Thompson, Commentaries on Negligence, § 3263; 15 Enc. Pl. &

Pr., p. 1124; 2 Fetter, Carriers, §§422, 425; *Boylan v. Hot Springs R. R. Co.*, 132 U. S. 146 (10 Sup. Ct. 50).

Again, the appellant Willerton was not a proper party to the first cause of action. If the respondent had a contract of carriage with the railway company, and Willerton, acting as agent for the appellant, had violated the agreement by refusing to comply with the terms of the contract, the appellant railway company was alone responsible for the damage caused thereby. The agent, not being a party to the contract, was not liable for the performance or non-performance of it. For this reason also the causes were improperly united. The demurrer should, therefore, have been sustained.

When the cause came on for trial before a jury, after the plaintiff had introduced his evidence, the defendants moved for a nonsuit as to the first cause of action. This motion was properly granted, and that cause of action withdrawn from the consideration of the jury. During the progress of the plaintiff's case a great deal of evidence had been introduced for the purpose of showing that the ticket purchased by plaintiff of a broker was a valid ticket, and that the company had waived the conditions contained in it against transfer from the original purchaser, had encouraged the scalping of such tickets, and had recognized them on its trains. After the first cause of action was withdrawn from the consideration of the jury, the defendants did not go into this branch of the evidence, but at the close of all the evidence requested the court to give the following instruction to the jury:

"Gentlemen of the jury. During the trial the court permitted the plaintiff to introduce evidence for the purpose of showing that the defendant railway company had waived any or all of the stipulations or conditions contained in the ticket or agreement for transportation, re-

serving at the time decision upon the legal question whether the evidence so introduced would be sufficient to go to the jury upon that question. And the court here now instructs you as a matter of law, to disregard and not consider such evidence; and further instructs you that the ticket received in evidence did not entitle the plaintiff to be carried or transported upon its train."

The court instructed the jury that the plaintiff was not entitled to ride upon the ticket introduced in evidence, but refused all the rest of the instruction requested. After the court had eliminated the first cause of action, and instructed the jury that the plaintiff was not entitled to ride upon the ticket which was offered in evidence, it should also have given the whole of the requested instruction. The evidence relating to the waiver of the conditions of the ticket and to the custom of the railway company to receive such tickets became entirely immaterial, and the jury should have been told specifically not to consider evidence relating thereto. When evidence is received juries are very apt to regard it as material to the cause in some way, and give it consideration, unless directed otherwise. This evidence had been received over appellant's objection. The cause of action to which it related had been eliminated from the case, but the jury were not told that they might not consider it. They were, therefore, privileged to believe that it had some bearing upon the issues submitted to them. Counsel for respondent now argue that such evidence was admissible to show the good faith of respondent in going upon the train. This contention would be correct if there were any issue as to the good faith of respondent at that time. When respondent was informed, after he had gone upon the train, that the ticket was not good for his passage and that he must pay his fare or get off, his good faith when he went on the train became en-

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tirely immaterial, and was no excuse for him to unlawfully remain there. The only question submitted to the jury, aside from the question of damages, was whether the conductor, Willerton, used more force than was necessary to put plaintiff off the train. The evidence relating to the waiver of the conditions of the ticket had nothing whatever to do in determining that issue. It served only to obscure the issue and confuse the jury. The court should have expressly told the jury not to consider it. *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648 (39 Pac. 95); *Thompson*, Trials, § 2415; *Jones*, Evidence, § 898; *Anson v. Evans*, 19 Colo. 274 (35 Pac. 47); *McDermott v Hannibal & St. J. Ry. Co.*, 87 Mo. 285.

For these reasons the cause is reversed, and remanded for further proceedings in accordance with this opinion.

FULLERTON, C. J., and DUNBAR, HADLEY and ANDERS, JJ., concur.

[No. 4547. Decided April 29, 1903.]

R. MATTHIES, *Appellant*, v. WILLIAM HERTH *et al.*, *Respondents*.

PARTNERSHIP — EXECUTION OF MORTGAGE — REFUSAL OF PARTNER TO JOIN — EFFECT.

A mortgage executed in the partnership name by some of the members of a non-trading partnership, to secure money loaned the firm from time to time for the purpose of increasing its plant and property, is a valid lien on the whole of the property of the firm, although one of the copartners refused to join in its execution, there being no affirmative showing that he refused his assent to the execution of the mortgage by the partnership, but, on the contrary, that the debt was incurred with his knowledge, and that he had enjoyed the fruits of the money received thereby in the betterment of the partnership property.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Affirmed.

Z. B. Rawson, for appellant.

Kriete & Kriete, for respondents.

The opinion of the court was delivered by

FULLERTON, C. J.—The appellant, who was plaintiff below, instituted this action to dissolve the partnership existing between himself and the respondents Hunnewinkel and Deutsch, and for an accounting and distribution of the partnership assets. The respondent Herth held a mortgage upon the partnership property, executed in the name of the partnership by the respondents Hunnewinkel and Deutsch, and he was made a party for the purpose of testing the validity of his mortgage as against the appellant's interests. Herth answered, setting up his mortgage, and praying for its foreclosure. The trial court held the mortgage to be a valid lien upon the partnership property, adjudged a foreclosure of the same, directed that the property be sold, that the mortgage debt be paid, that the partnership be dissolved, and that the money received from the sale of the property remaining after the payment of the mortgage debt be divided equally between the partners. The appeal is from that judgment.

The appellant makes two principal assignments of error, namely: First, that the evidence is insufficient to support the findings of fact; and, second, that the findings of fact are insufficient to support the judgment. He has not, however, brought the evidence into this court for review, and the questions made upon the first assignment are not, for that reason, open to him, and we shall examine the record on the second question only.

The findings of fact made by the trial court material

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to the question presented are, in substance, these: The partnership was formed October, 1889, for the purpose of engaging in the business of manufacturing useful and ornamental iron and wire fixtures, such as bank and office railings, iron and wire window guards, coal and sand screens, wire fences, etc. The property of the partnership at the time of the execution of the mortgage consisted of a leasehold interest in certain lots situated in the city of Seattle, a building erected thereon by the partnership, and certain machinery and stock in hand used in carrying on the partnership business. From time to time after the formation of the partnership the respondents Hunewinkel and Deutsch, for and on behalf of the partnership, and with the knowledge of the appellant, borrowed of the respondent Herth various sums of money aggregating \$5,000, which was used in the construction of the building above mentioned and in the purchase of machinery and stock used in and for carrying on the partnership business. The mortgage in question was executed to secure the payment of the money so borrowed. Prior to its execution the respondents Hunewinkel and Deutsch requested the appellant to join in its execution, which he refused to do, whereupon they executed the mortgage in the partnership name and as individuals, covering the entire property of the partnership. The court further found that there were no other partnership debts.

The appellant invokes the rule that one partner, or any number less than all, in a nontrading partnership has no implied authority to issue notes in the firm name, and secure the same by mortgaging the partnership property, and argues therefrom that, inasmuch as the court found that the money was borrowed and the mortgage given by his copartners without finding that he gave his assent

thereto, it failed to find facts sufficient to sustain the mortgage as against his interests in the partnership property, and asks us to so modify the judgment of foreclosure as to direct that one-third of the proceeds of the sale of the partnership property be paid to him regardless of the mortgage debt. But we are of the opinion that the appellant is not entitled to the relief he asks, whatever view may be taken as to the validity of the mortgage. The debt which the mortgage was given to secure was not only contracted in the partnership name with the appellant's knowledge, but the money received thereby was actually used for the benefit of the partnership, most of it in the acquisition of the very property which he now seeks to have awarded to him. Under these circumstances the appellant cannot successfully contend that the debt is not a partnership debt. The ordinary rules of estoppel, if nothing else, will now prevent him from saying that his assent was never given to the contraction of the debt, even if his assent was at any time necessary. The debt being a partnership debt, it is, on dissolution of the partnership, a first lien upon the partnership property as against the interests of the partners, and the court would, in any event, direct it to be paid out of the proceeds of the sales of the partnership property before any part thereof was distributed among the partners. In this case, therefore, as there are no other partnership debts, were it not for the fact that the mortgage lien carried with it an attorney fee, which the ordinary lien does not carry, it could make no difference to the appellant whether the property was sold under the mortgage lien or the lien which follows the partnership debt, as the mortgage bore a rate of interest less than the legal rate, and the costs of sale would not be different. At most, therefore, the court could only relieve him from the judgment for the attorney's fee.

But the question, Is the mortgage valid? we think should be answered affirmatively. True, the court found that the appellant refused, when requested, to join in its execution. But this, as we understand it, was not intended as a finding that he refused his assent to the execution of the mortgage by the partnership, but was intended as a finding that the appellant declined to obligate himself personally, independent of his partnership relation, for the payment of the debt. Giving it this construction, there is nothing in the record which disputes the validity of the mortgage. The court found that it was executed in the partnership name, on behalf of the partnership, for a partnership debt, by two of the partners, and the rule is that a mortgage or other instrument executed on behalf of a partnership by one of the partners is presumed to be the authorized act of the partnership, and is overcome only by an affirmative showing to the contrary.

The judgment is affirmed.

DUNBAR, HADLEY, ANDERS and MOUNT, JJ., concur.

[No. 4549. Decided April 29, 1903.]

THOMAS J. CONSIDINE, *Respondent*, v. MARTIN J. GALLAGHER, *Defendant*, UNITED STATES FIDELITY AND GUARANTY COMPANY, *Appellant*.

PLEADING—ACTION ON GUARANTY BOND—ALLEGATION OF CONSIDERATION.

A complaint on a guaranty bond is not demurrable for want of facts because it appears that the bond was executed a week later than the execution of the contract it guarantied, and there is no allegation of consideration for the guaranty, when the complaint sets out the bond in full, showing it to be an instrument under seal, which in itself imports a consideration.

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Affirmed.

Ellsworth, Reed & McGrew and *Gorham, Brown & Gorham*, for appellant.

John E. Humphries and *Harrison Bostwick*, for respondent.

The opinion of the court was delivered by

FULLERTON, C. J.—The respondent, Considine, entered into a contract with the defendant, Gallagher, by the terms of which the defendant undertook to furnish all of the necessary materials and construct for the respondent a dwelling house according to certain plans and specifications agreed upon between the parties for a fixed consideration. To secure the faithful performance of the work, the defendant entered into a bond, with the appellant as surety, in the sum of two thousand dollars, conditioned that he would carry out the contract. The defendant thereafter entered upon the prosecution of the work and partially completed the same, finally abandoning it before completion. The respondent thereupon, after notifying the surety to complete it, and after its refusal to do so, completed the building himself at a cost exceeding the original contract price by more than the amount of the bond. He brought this action upon the bond to recover for the loss to the amount of the penalty named in the bond.

A demurrer was interposed to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and overruled by the trial court, which ruling constitutes the first error assigned. The complaint averred that the building contract was entered into on the 12th day of December, 1900, while the bond as set out

in the complaint bore date as of the 19th day of December, 1900. The contention is that the bond was executed so long subsequent to the original contract that it cannot be presumed to be a part of the same transaction, or supported by the original consideration, and for that reason it was necessary that it be alleged that the bond was made upon sufficient consideration, in order to state a cause of action upon it. The general rule in regard to guaranty is that, if the guaranty and contract guarantied are a part of the same transaction, the consideration for the latter supports the former; while if they are not one transaction, the bond must be supported by a consideration independent of the consideration for the original contract. But this rule does not aid the appellant here. It is a rule of pleading, and not a rule of evidence, that he is contending for. Hence, if the complaint in any form contains an allegation of consideration for the bond, or contains an allegation of fact from which consideration is implied, it is sufficient. Here the complaint, at least, does the latter. The bond is set out in full therein, even as to the manner of its execution, showing it to have been an instrument under seal; and the rule of the common law is—and it has not been changed in this state—that a contract under seal imports a consideration. In such a case want of consideration, if available at all, is a matter of defense. 6 Am. & Eng. Enc. Law (2d ed.), pp. 762, 763.

The other errors assigned are based upon the sufficiency of the evidence to support the findings of fact, but, as no exceptions to the findings were taken, they cannot be considered.

The judgment appealed from is affirmed.

DUNBAR, HADLEY, ANDERS and MOUNT, JJ., concur.

[No. 4229. Decided April 30, 1908.]

W. H. FERNALD, *Respondent*, v. SPOKANE AND BRITISH COLUMBIA TELEPHONE AND TELEGRAPH COMPANY, *Appellant*.

CORPORATIONS — POWERS OF VICE PRESIDENT — EMPLOYMENT OF COUNSEL.

The acts of counsel for a corporation appointed by a vice president thereof are binding on the corporation, where the president had resigned and left the country, and the vice president was the acting president.

SAME — INSOLVENCY — APPOINTMENT OF RECEIVER.

The action of the trial court in appointing a receiver for a corporation upon the application of a creditor will not be disturbed on appeal on a showing made that the corporation had been conducting a telephone business which it had recently abandoned upon a transfer of its franchises and business to another company; that it was allowing its entire tangible property, consisting of wires, poles and telephone instruments to go to ruin, without any effort to care therefor; and that the board of trustees cannot agree upon the management of its affairs, and that the company must continue without official management, unless a receiver be appointed.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

Post, Avery & Higgins, Stoll & Macdonald and M. J. Gordon, for appellants.

Thomas C. Griffiths and Cullen & Dudley, for respondent.

PER CURIAM.—Respondent brought this suit against the appellant Spokane & British Columbia Telephone & Telegraph Company and its codefendants Inland Telephone & Telegraph Company and the Pacific States Telephone & Telegraph Company. It is alleged in the complaint that

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the first-named company erected a telephone line between Northport and Spokane, in the state of Washington, together with a branch line from Bossburg to the international line between the United States and Canada, connecting with the town of Greenwood, in the Province of British Columbia, Canada; that for the purpose of expediting its business and in furtherance of the purposes of its creation, said company entered into a contract in writing with its first above named codefendant company, whereby, among other things, it was provided that the latter company would permit the former to connect the Spokane end of its line with the switch board of the latter at Spokane, and that the employees of the latter company should promptly receive all telephone business offered by the former for transmission over the line of the former to Spokane, and should also transfer all business originally received at Spokane for transmission to points on the line of the former company. It is alleged that the Spokane & British Columbia Telephone & Telegraph Company duly performed all conditions of the contract required of it, but that the Inland Telephone & Telegraph Company after a time disregarded its contract, and in violation thereof refused to receive messages originated on the line of the former company for transmission to Spokane, and likewise refused to receive messages at Spokane for transmission over said line; that it caused the wires connecting the former company's line with the said exchange office in Spokane to be cut, thus disconnecting the line and paralyzing the entire business of the former company, to its great damage; that said Spokane & British Columbia Telephone & Telegraph Company contracted with the Columbia Telephone-Telegraph Company of Canada for the reception and transmission of telephone business, and had

from that source made large sums of money and built up a large, thriving, and growing business; that the destruction of its business by the wrongful acts aforesaid of the said Inland Telephone & Telegraph Company prevent, and will continue to prevent, the performance of said contract with the Canadian company; that the Inland Telephone & Telegraph Company is the owner of a rival line between Northport and Spokane, and that for the purpose of ruining and destroying the business of the Spokane & British Columbia Telephone & Telegraph Company it caused all the wires of the latter company in the city of Spokane to be cut and destroyed, and the insulators, cross-arms, and other apparatus to be carried away, said destroyed wires and apparatus covering a distance of about three miles; that on the first day of March, 1898, and during the uninterrupted operation under the contracts aforesaid, the respondent loaned the Spokane & British Columbia Telephone & Telegraph Company the sum of \$15,000, which was secured by a mortgage upon all the corporate rights, privileges, franchises, telephones, poles, wires, contracts, leases, agreements, property, and contract rights of every kind, legal and equitable, of said company; that the damages suffered by the Spokane & British Columbia Telephone & Telegraph Company because of the destruction of its business aforesaid were each and all damages to respondent as mortgagee, and impaired and destroyed the security in his said mortgage contained; that on June 29, 1899, said Spokane & British Columbia Telephone & Telegraph Company commenced an action for damages against said Inland Telephone & Telegraph Company, alleging as the basis of recovery the matters and things in this complaint alleged, together with other things, and claiming damages in the

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sum of \$205,000. It is further alleged that in August, 1901, certain persons, claiming to represent the two companies, the parties to said suit, contriving and intending to cheat and defraud said respondent and to destroy his security as aforesaid, fraudulently agreed together to dismiss said action without respondent's knowledge or consent and in fraud of his rights as mortgagee as aforesaid, and in pursuance thereof procured a dismissal of the cause on the pretended ground that the controversy had been settled between the parties. A second cause of action alleges the insolvency of the respondent's mortgagor company, and that it is making no provision for the payment of the mortgage; that since the commission of the acts above mentioned, by which respondent's security was impaired, the said Inland Telephone & Telegraph Company has transferred its rights, privileges, franchises, and business to the Pacific States Telephone & Telegraph Company, and has thereby deprived itself of the ability to respond in damages for said wrongful acts, in violation of its said contract. Allegations are made to the effect that the entire business of the Spokane & British Columbia Telephone & Telegraph Company is about to be discontinued and its entire tangible property, consisting of hundreds of miles of telephone wires and poles and hundreds of telephone instruments, has been left to go to ruin, and the whole concern has been thereby wrecked; that no effort is made to care for said property, to attend to the business and affairs of said company, or to make any provision for the payment of the interest or principal of said mortgage; that the board of trustees of said company can not hold a legal meeting or agree upon the management of its affairs, and that the company must continue without official management, unless the court shall appoint a receiver. Judge

ment for \$205,000 is demanded in accordance with the foregoing allegations against the Inland Telephone & Telegraph Company and the Pacific States Telephone and Telegraph Company, and the appointment of a receiver for the Spokane & British Columbia Telephone & Telegraph Company is prayed.

After the complaint was filed, the following written appearance was made in the cause:

"The defendant the Spokane & British Columbia Telephone & Telegraph Company, by its attorneys, Danson & Huneke, hereby appears in the above-entitled cause, and consents that plaintiff's application for a receiver herein may be at once heard and determined, and hereby joins in said application, subject to the judgment of the court as to the necessity of having a receiver, and consents that oral testimony may be taken herein on said application, if desired or required."

Thereupon the court heard evidence and appointed a receiver for said company. Later a motion was made by other counsel, who claimed to represent said company, asking an order vacating and setting aside the order appointing the receiver, on the alleged grounds that the receiver was appointed without notice to said company, and that it had never appeared or consented to said appointment; that the attorneys who attempted to appear when the application for a receiver was heard had no authority to waive notice or to appear in the action at all on behalf of the said company. The motion also alleges that the person appointed receiver is not a fit and competent person to act as such. Upon the hearing of this motion evidence was introduced and the court appointed a new receiver, but refused to vacate the order appointing a receiver. From the order refusing to vacate the former order appointing a receiver this appeal is prosecuted.

The record shows that the president of said company had resigned and was absent from the country; that one Babcock, a trustee, was vice-president and acting president; that he employed Danson & Huneke as attorneys for said company and authorized them to make the written appearance above set forth. Had the vice-president and acting president the power to authorize such appearance?

"The president of a corporation, being its chief executive officer, may appear and answer for it and employ counsel for its defense. Counsel whom he thus employs can bind the corporation by their actions in the case, within the ordinary powers of counsel, and this, too, even though the circumstances show that the president acted so improperly in employing the counsel that he might properly be held responsible for his breach of trust in the employment of the counsel." 17 Am. & Eng. Enc. Law, p. 131.

See, also, *Colman v. Oil Co.*, 25 W. Va. 148; *Recamier Mfg. Co. v. Seymour*, 5 N. Y. Supp. 648; *Reno Water Co. v. Leete*, 17 Nev. 203 (30 Pac. 702); *Potter v. New York Infant Asylum*, 44 Hun, 367; *Wetherbee v. Fitch*, 117 Ill. 67 (7 N. E. 513); *Davis v. Memphis City Ry. Co.*, 22 Fed. 883; *Weeks*, Attorneys at Law (2d ed.), § 190.

From the authority last cited we quote as follows:

"When the president of a corporation authorizes an attorney or solicitor to prosecute or defend a suit, or to commence any legal proceeding in which the corporation is interested, the attorney or solicitor will be authorized to appear for the corporation, and such corporation will be bound by his acts. And if the president exceed his authority in retaining counsel, the corporation must look to him for any damages sustained in consequence of such unauthorized act."

In view of the foregoing authorities, we think the cor-

puration should not now be heard to say that it did not authorize the appearance by which notice of the hearing upon the application for a receiver was waived. In further view of the allegations of the complaint, the substance of which is hereinbefore stated at length, we shall not undertake to say that the court should have found, upon the hearing of the motion to vacate its former order, that no ground for a receivership was stated in the complaint, or was shown at the time of the application.

The judgment is affirmed.

[No. 4272. Decided May 2, 1903.]

LEO KEE, *Appellant*, v. WAH SING CHONG *et al.*, *Respondents*.

ACTIONS — PREMATURE COMMENCEMENT — METHOD OF RAISING OBJECTION.

The objection that an action was prematurely brought must be pleaded to be available, and cannot be raised for the first time on motion for new trial.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Reversed.

A. H. Kenyon, for appellant.

Saunders & Bassett and T. D. Rockwell, for respondents.

PER CURIAM.—This is an action upon an attachment bond, brought by appellant against respondents. The cause was tried before a jury, and a verdict returned in favor of appellant for \$300. A motion for a new trial interposed by respondents was granted on the ground, as stated in the order of the court, that the action was prematurely

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brought. From the order granting a new trial this appeal was taken.

The only error assigned is that the court set aside the verdict and granted a new trial on the ground that the action had been prematurely brought. The defense that the action was prematurely brought was not raised in the pleadings, and it appears to have been suggested for the first time on the hearing of the motion for a new trial. This objection can not be raised for the first time after trial. *Hickey v. Thompson*, 52 Ark. 234 (12 S. W. 475). It has been held that the objection must be raised by plea in abatement, and can not be alleged as a defense on the merits. 1 Enc. Pl. & Pr., 22. It has also been held that a pleading to the merits is a waiver of the objection that the action has been prematurely brought. *Fiore v. Ladd*, 20 Ore. 528 (46 Pac. 144). If it be conceded, however, that, under our code practice, the objection may be taken by answer, along with other defenses to the merits, yet, in any event, it should be raised by answer of some kind. *Smith v. Holmes*, 19 N. Y. 271.

The only ground stated in the motion for new trial that may be said to inferentially suggest that this point was raised even at the trial is the following: "Errors of law occurring at the trial, and excepted to by the defendants." But there is no statement of facts here, and nothing in the record to show that the point was even raised by way of objection to offered testimony. As we have seen, however, if the objection to testimony had been so made, it would have been unavailable in the absence of a pleading upon the subject. The motion for new trial having been expressly granted upon the one ground, we think the court erred for reasons above stated.

The judgment is therefore reversed, and the cause re-

manded, with instructions to the lower court to deny the motion for new trial, and enter judgment upon the verdict of the jury.

[No. 4401. Decided May 2, 1908.]

WILLIAM CUTLER *et ux.*, *Appellants*, v. CO-OPERATIVE
BROTHERHOOD *et al.*, *Respondents*.

FORCIBLE ENTRY AND DETAINER — ACTION BY TENANT — EXPIRATION OF
LEASE — EFFECT.

Although a lease may have expired prior to the trial of an action by the tenant for forcible entry, the tenant may still recover in the same action damages flowing from the forcible entry and detainer, even if he no longer has a right to a precedent judgment for restitution.

Appeal from Superior Court, Kitsap County.—Hon.
JOHN C. DENNEY, Judge. Reversed.

J. B. Yakey and Jesse Thomas, for appellants.

Samuel S. Carlisle and Charles E. Patterson, for respondents.

PER CURIAM.—On the 26th day of April, 1900, while appellants were in possession under a lease of a certain tract of land in Kitsap county, the respondents forcibly entered thereon, and took possession of a certain portion thereof, tearing down the boundary fence inclosing the field, and moving the same to where they claimed the line was properly located, thereby exposing the crops of the appellants to the ravages of outside stock by which it was destroyed; whereupon they commenced an action in ejectment against the respondents. Before the action was tried, appellants' lease had expired, and the lessor had brought

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an action in ejectment and obtained a judgment of ejectment against the respondents. The appellants asked and obtained leave of the court to change their complaint from an action in ejectment to that of forcible entry. It does not appear that any objection was raised to this motion. The defendants answered, and the case went to trial. Upon the completion of appellants' testimony, the respondents, by counsel, challenged the sufficiency of the evidence introduced on behalf of the plaintiffs, and moved the court to instruct the jury to return a verdict for defendants, or for the court to dismiss the case on the ground that no judgment of restitution could be entered, and consequently that there could be no claim maintained for damages. The court sustained the motion, and the case was dismissed. Judgment for costs was entered, and this appeal followed. So that the question presented is, can a tenant, whose lease has expired before the trial of an action which has been brought for forcible entry, recover for damages flowing from the forcible entry and detainer, where the landlord has recovered judgment for the possession of a portion of the leased land which was taken away from the tenant during the lease.

It is contended by the respondents that, the action for forcible entry being a special action, a judgment for restitution must precede a judgment for damages. But all statutory actions are, in a sense, special actions, and we think it would be violative of the spirit of the Code to dismiss a plaintiff out of court, burden him with the costs of his action, and compel him to commence a separate action for damages, when the damages had been sustained before the commencement of the action. It is true that probably no writ of restitution could be adjudged under the testimony adduced in this case, but it is not uncommon

under the practice where one cause of action fails, to allow the case to proceed to judgment on another cause of action. It matters not whether the right invoked had never really existed, or whether it had ceased by some subsequent proceeding or happening. In this case the same issues would have to be tried in a direct action for damages to determine the question of whether the respondents were responsible to appellants for damages, as in an action for forcible entry and detainer, for the damages could be awarded only on the theory that forcible entry and detainer had been committed by the defendants. It would be trifling with the rights of the plaintiffs to dismiss their cause, and compel them to bring another action involving exactly the same issues, for the purpose of determining the amount of their damages. The cases cited by appellants, viz: *King v. Lawson*, 98 Mass. 309, *Townsend v. VanAspen*, 38 Ala. 572 and *Hyde v. Fraher*, 25 Mo. App. 414, we think sustain appellants' contention, although it is claimed by the respondents that they are not in point.

We think the court erred in dismissing the case, and that it should have proceeded to judgment on the question of damages. The other errors alleged are incidental, and, as they may not occur again at a subsequent trial, we will not notice them here.

The judgment is reversed, and a new trial granted.

[No. 4523. Decided May 2, 1903.]

FIRST NATIONAL BANK OF SEATTLE, *Respondent*, v. GORDON HARDWARE COMPANY, *Defendant*, JAMES C. SPURR *et al.*, *Appellants*.

APPEAL — FAILURE TO SERVE NOTICE ON ALL PARTIES.

An appeal from a judgment in favor of plaintiff will be dismissed on motion, where one of the defendants did not join in the

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appeal and was not served with notice thereof, where its answer, though an admission of the allegations of the complaint, was not a disclaimer of interest, and where it appeared from the record that it had a very lively interest against the success of the appellants.

Appeal from Superior Court, King County,—Hon. BOYD J. TALLMAN, Judge. Appeal dismissed.

W. D. Lambuth, for appellants.

I. D. McCutcheon, for respondent.

PER CURIAM.—This cause was before this court on a motion to dismiss the appeal, based on a short record, showing that the defendant, Gordon Hardware Co., had appeared in the action, and had not been served with the notice of appeal. 30 Wash. 127 (70 Pac. 251.) This motion was denied, for reasons stated in the opinion, with leave to renew when the full record should be brought into this court. On the full record being brought here, the respondent renewed its motion, and submitted it at the time the cause was assigned for hearing on the merits. The motion must be granted. The answer of this defendant, though an admission of the allegations of the complaint, was not a disclaimer of interest in the subject-matter of the dispute; nor does it appear from the record that it had no such interest. On the contrary, the record is to the opposite effect. While it appears that its interests were with the respondent, it appears that it had a very lively interest against the success of the appellants. As the appellants' appeal is to promote that success, it, of course, has the same interests in this court, and should have been served with the notice of appeal as required by statute.

Appeal dismissed.

[No. 4470. Decided February 7, 1902.]

C. A. LOY *et al.*, Respondents, v. C. P. COFF, Appellant.

Appeal from Superior Court, Spokane County.—Hon. WILLIAM E. RICHARDSON, Judge. Appeal dismissed.

Moore & Corbett, for appellant.

A. J. Laughon, for respondents.

PER CURIAM.—The respondent moves to dismiss this appeal for the reason that the alleged appeal bond is ineffectual, in that the penalty of said bond, which purports to be an appeal and supersedeas bond, is not double the amount of the judgment and \$200, required by the statute for bond on appeal. This case falls squarely within the rule announced in *Pierce v. Willeby*, 20 Wash. 129 (54 Pac. 999); *Town of Sumner v. Rogers*, 21 Wash. 361 (58 Pac. 214); *Galloway v. Tjossem*, 22 Wash. 103 (60 Pac. 129); *Beezley v. Sessions*, 22 Wash. 125 (60 Pac. 130); and *Graham v. American Surety Co.*, 28 Wash. 735 (69 Pac. 365).

The motion will be sustained, and the appeal dismissed.

(No. 4577. Decided February 18, 1903.)

STATE OF WASHINGTON on the Relation of J. N. Moore v. SUPERIOR COURT OF KING COUNTY, W. R. Bell, Judge thereof. Respondent.

Original Application for Prohibition.

John H. Mahan, for relator.

James B. Murphy, for respondent.

PER CURIAM.—This is an application for a writ of prohibition against the superior court of King county in a cause appealed from a justice's court where the amount involved is less than \$200. Under the rule announced in *State ex rel. Fuller v. Superior Court of King County*, ante, p. 96, the petition will be denied.

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(No. 4591. Decided March 5, 1903.)

CALDENTE BAILEY, *Respondent*, v. SEATTLE & RENTON RAILWAY
COMPANY, *Appellant*.

Appeal from Superior Court, King County.—Hon. ARTHUR E.
GRIFFIN, Judge.

Peters & Powell, for appellant.

Will E. Humphrey, for respondent.

PER CURIAM.—For the reasons announced in *County of Jefferson v. Trumbull*, *ante*, p. 217 (71 Pac. 787), the motion to dismiss in this case will be denied.

(No. 4476. Decided March 23, 1903.)

MRS. G. E. HALL, *Respondent*, v. A. J. STEELE *et al.*, *Appellants*.

Appeal from Superior Court, King County.—Hon. BOYD J.
TALLMAN, Judge. Affirmed.

Roberts & Leshey, for appellants.

William Martin and *W. A. Keene*, for respondent.

PER CURIAM.—Action to foreclose a lien. Plaintiff had judgment below and defendants appeal.

The only question in the case is whether there was a contract for the work done. The plaintiff below, testified that there was a verbal contract, while the defendants testified that there was none. Aside from the fact that the work was done, there are no convincing circumstances in the record favoring either party. The court below saw and heard the witnesses, and found in favor of the respondent. After a careful examination of all the evidence, we are not disposed to disturb the findings.

The judgment is therefore affirmed.

(No. 4385. Decided March 26, 1903.)

JAMES N. FOYE *et al.*, Respondents, v. ALBERT SHORE *et ux.*, Respondents, WILLIAM F. MELOY *et al.*, Appellants.

Appeal from Superior Court, Pacific County.—Hon. ALONZO E. RICE, Judge. Affirmed.

W. B. Stratton and H. W. B. Hewen, for appellants.

Sol. Smith, John T. Welsh and Martin C. Welsh, for respondents.

PER CURIAM.—This is a suit to remove a cloud from and quiet title to real property. On August 19, 1899, the respondents, Albert Shore and his wife, Sarah A. Shore, owned as community property certain land situated in Pacific county, known and described as lots 14 and 15, of a certain section, township, and range. On the day named Albert Shore entered into an agreement in writing, by the terms of which he agreed to convey lot 14 to the respondents James N. Foye and James E. Foye, on the payment to him of the sum of five hundred dollars in five monthly installments, the first of which he acknowledged receipt. On May 14, 1900, Shore and wife, for the recited consideration of one dollar, conveyed lot 14 by warranty deed to the appellant, William F. Meloy, who in turn, on February 12, 1901, conveyed it to the respondent A. A. Nicol. On June 18, 1900, after the conveyance to Meloy, but before the conveyance from Meloy to Nicol, Shore and wife conveyed the property to James N. Foye and James E. Foye, pursuant to the contract first mentioned. It is the contention of the respondents that the deed from Shore and wife to Meloy was a mutual mistake, it being intended thereby to convey lot 15, instead of lot 14, and that the deed from Meloy and wife to Nicol was taken by Nicol with knowledge of all the facts, and that he was not an innocent purchaser for value. The court found in accordance with this contention, and entered a decree setting aside the deeds from Shore and wife to Meloy, and from Meloy to Nicol, as a cloud upon the title of the respondents Foye. Meloy and Nicol appeal.

The questions presented by the appeal are wholly questions of fact. The able and industrious counsel seem to have brought in evidence every fact surrounding the several transactions which tend even in the remotest degree to throw light upon

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them, and have made a somewhat voluminous record. Among it all there is much that seemingly makes against the conclusions of the trial court, but on the whole we think its findings are amply sustained. It would be of no value as a precedent, nor would it subserve any useful purpose otherwise, to set out and review the evidence at length. Suffice it to say, therefore, that we have examined the record with care, and fail to find anything to justify a reversal of the judgment.

Affirmed.

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43. *Supersedeas Bond—Staying Costs.* Where the judgment was for costs, and also for other relief, a supersedeas bond which is in double the amount of the costs and \$200 additional is sufficient to operate as a supersedeas upon the judgment for costs and as an appeal bond, and therefore give the supreme court jurisdiction, although not sufficient to operate as a supersedeas on other parts of the judgment.—*Lacaff v. Dutch Miller Mining & Smelting Co.* 566
44. *Harmless Error—Refusal to Strike Irresponsive Answer Cured by Instructions.* The refusal of the court to strike an answer that was not responsive was not prejudicial error, where the court subsequently told the jury they could not consider evidence of that character.—*McDannald v. Washington & Columbia River Ry. Co.* 585
45. *Same—Instructions not Within Issues.* The modification by the court of a requested instruction stating a general rule of law by adding thereto an exception to the general rule would not be prejudicial, although not within the issues of the case, when the adverse party did not claim recovery by reason of the exception and there was evidently no intention of the court to apply the exception to the case on trial.—*Id.* 585
46. *Exceptions to Evidence—Sufficiency.* When a proper exception to the admission of testimony has been taken, but overruled by the court, it is sufficient to apply to subsequent errors of the same kind in the examination of the witness, although the question to which specific objection was raised may not have been intelligently and responsively answered.—*DeWald v. Ingle.* 616
47. *Failure to Serve Notice of Appeal on Sureties.* An appeal from a judgment on a cost bond will be dismissed, where the sureties on the bond have not joined in the appeal nor been served with notice of the appeal.—*Pierce v. Commercial Investment Co.* 655

APPEAL—CONTINUED.

48. *Motion to Dismiss—Notice of Motion—Sufficiency of Service.* A certificate of service of a motion upon the attorney for defendant to the effect that the sheriff, having made diligent search for such attorney without being able to find him at his usual place of abode or anywhere else, had duly served the motion on said attorney by leaving a copy thereof under the door of a room which he believed to be the office of said attorney, is not a sufficient showing of service.—*Rogers v. Trumbull*..... 656
49. *Same—Time of Service.* A motion to dismiss an appeal will not be considered, where the appellant has not had ten days' notice required by the supreme court rules in such cases.—*Id.* 656
50. *Failure to Serve Notice on All Parties.* An appeal from a judgment in favor of plaintiff will be dismissed on motion, where one of the defendants did not join in the appeal and was not served with notice thereof, where its answer, though an admission of the allegations of the complaint, was not a disclaimer of interest, and where it appeared from the record that it had a very lively interest against the success of the appellants.—*First National Bank v. Gordon Hardware Co.*..... 682

See CERTIORARI; CORPORATIONS, 6; COURTS, 2; MUNICIPAL CORPORATIONS, 16; PLEADING, 3; PROCESS, 2; PROHIBITION, WRIT OF, 2-5; RECEIVERS, 3; TAXATION, 4.

ARBITRATION AND AWARD.

Agreement for Submission—Waiver of Right to Claim. Where the *status quo* under a party wall agreement, which provided for the common use of halls, stairway and elevator in adjoining buildings, and that in case of a dispute between the parties resort should be had to arbitration, was disturbed by the wrongful action of one of the parties in dispossessing the other from the free use of the premises in dispute, the injured party may resort to the courts, instead of being compelled to propose an arbitration.—*Winsor v. German Savings & Loan Society* 365

ATTACHMENT. See MANDAMUS, 4; SALES.

ATTORNEY AND CLIENT.

Assignment of Client's Mortgage to Corporation—Effect of Attorney's Ownership of Stock. Where a stockholder of a corporation, while acting as attorney for mortgagor, procures an assignment of the mortgage to his corporation at a large discount, his interest as stockholder is such that his client is entitled to the benefit of the transaction, and the corporation would not be entitled to foreclose for more than the amount of purchase price and taxes paid, with interest thereon, and a reasonable attorney's fee.—*Security Savings Society v. Cochran*.... 266

See CORPORATIONS, 5; CRIMINAL LAW, 8, 10, 11; EMBEZZLEMENT, 1, 2; PROCESS, 1.

BANKS AND BANKING.

Loan Made by Officers—Ratification by Directors. The directors of a bank are estopped to deny the authority of the cashier and assistant cashier in the extension of credit to a speculative corporation in which the latter were stockholders, where the directors had known of the course of dealing for a period of five years without making objection thereto, and consequently the loan of the bank's money to such corporation under such circumstances is insufficient to establish a conversion of the funds.—*First National Bank of Pullman v. Gaddis*.... 596

See FRAUDS, STATUTE OF; TROVER AND CONVERSION, 1, 2,

BARBERS. See CONSTITUTIONAL LAW, 1, 2; STATUTES, 1, 2.

BILLS AND NOTES. See WITNESSES, 3.

BONDS. See APPEAL, 23, 33, 43; PLEADING, 5.

CANCELLATION OF INSTRUMENTS.

Judgment on Pleadings—Denial of Immaterial Issues. In an action for the rescission of a conveyance, because the obligation to support the grantor during his life had been ended by the death of the grantees, judgment for the

CANCELLATION OF INSTRUMENTS—CONTINUED.

grantor on the pleadings was warranted, where the answer admitted the consideration for the deed and the death of the grantees and its only denials were addressed to the immaterial allegations of the complaint that the sum of one dollar specified in the deed had not been paid and that the grantees had not supported the grantor for certain years.—*Payette v. Ferrier*..... 43

CARRIERS.

1. *Action for Loss of Goods—Title of Plaintiff.* In an action to recover the value of hay lost through the negligence of a carrier, while stored in its dock awaiting shipment, plaintiff's ownership, though denied, is sufficiently established, where the evidence shows that plaintiff employed a third party to purchase the hay for it and deliver same at the dock to be shipped plaintiff, who had agreed to pay such third party a stipulated price per ton, when it appears that the plaintiff and such third party, between themselves, always treated the title to the hay as being in plaintiff.—*Union Feed Co. v. Pacific Clipper Line* 28
2. *Ejecting Passenger—Breach of Contract—Tortious Acts—Misjoinder of Causes—Demurrer.* In an action against a railway company and its conductor for the ejection of a passenger from a train, the complaint is demurrable for misjoinder of causes of action, when one cause is founded upon the alleged breach of contract of carriage and another cause is founded on the acts of the conductor and other employees in bruising and mutilating plaintiff in ejecting him from the train with unnecessary force and violence.—*Clark v. Great Northern Ry. Co.* 658
3. *Same—Parties.* Where the conductor on a railway train, acting as agent for the company, refuses to comply with the terms of the contract of carriage held by a passenger, the company, and not the agent, is liable for the breach, and therefore his joinder as defendant would subject the complaint to demurrer.—*Id.*..... 658
4. *Same—Nonsuit as to One Cause—Elimination of Evidence in Submitting Remaining Cause to Jury.* In an

CARRIERS—CONTINUED.

action for damages for ejecting a passenger who was attempting to ride upon a scalper's ticket in which the complaint set up as causes of action the breach of contract of carriage and the tortious acts of the company's employees in forcibly ejecting plaintiff, and, after the evidence was in, the plaintiff was nonsuited as to the first cause of action, in support of which evidence had been admitted tending to show that the company had waived the conditions against transfer of tickets from the original purchaser, had encouraged the scalping of tickets, and had recognized them on the trains, it was error for the court to refuse to instruct the jury to disregard such evidence, since it was immaterial on the only issue remaining—the question of whether more force than was necessary had been used in putting plaintiff off the train.—*Id.*..... 658

CERTIORARI.

Remedy by Appeal—Appropriation of Land for Drainage Purposes. Certiorari will not lie to review errors of the trial court in assessing damages and benefits to lands by reason of the construction of a drainage system, since it is provided by Laws 1901, p. 181, § 1, that appeal in such cases "shall bring before the supreme court the propriety and justice of the amount of damage or assessment of benefits," thereby affording a review of all errors; and the adequacy of the remedy by appeal would not be affected by the fact that the lien of the judgment would attach pending the determination of the appeal.—*State ex rel. Nelson v. Superior Court.*..... 32

CHARITIES. See **WILLS**, 2.

CITIZENS. See **PUBLIC LANDS**, 2.

CLERKS OF COURT. See **COSTS**, 1, 2.

COMMUNITY PROPERTY. See **ESTOPPEL**, 3; **HUSBAND AND WIFE**, 2-5.

COMPROMISE AND SETTLEMENT.

Will Contest—Construction of Compromise Agreement.

Where a compromise of a will contest was entered into, whereby it was agreed that a certain daughter should have all the real estate standing in the name of deceased at the time of his death, "which said real estate is more particularly described in a quit-claim deed executed in conformity with this stipulation and agreement," such daughter is entitled to after discovered real estate in other counties, the record title to which was in the deceased at the time of his death, but which had not been described in the quit-claim to her because unknown to both parties.—*Lamona v. Cowley*..... 297

See JUDGMENT, 9.

CONSTITUTIONAL LAW.

1. *Local and Class Legislation.* The act to regulate barbering (Laws 1901, p. 349) is not void on the ground of being local, class, and special legislation because of the fact that it divides the communities of the state into classes, for which different regulations are provided, when the law is made to operate equally upon all barbers within the respective classifications.—*State v. Sharpless*..... 191
2. *Equal Protection of Laws.* The fact that a law provides for the issuance of a certificate without examination, upon the payment of one dollar, to all barbers carrying on their occupation in cities of the first, second and third classes at the time the act took effect, while barbers subsequently coming into those cities would be required to stand examination and pay five dollars for a certificate, would not render the act void as discriminating against one class of citizens in favor of others, since the law operates equally upon all who fall under its operation.—*Id.* 191
3. *Equal Privileges—Mileage of County Superintendents.* Section 8 of the act of March 19, 1901 (Laws 1901, p. 377) authorizing county superintendents to charge five cents mileage in counties of the first to the tenth classes inclusive and ten cents mileage in all counties having a higher class number than the tenth, does not violate art.

CONSTITUTIONAL LAW—CONTINUED.

- 1, § 12, of the state constitution, which prohibits the passage of laws granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all.—*Henry v. Thurston County* 638
4. *Equal protection of the Laws.* Such a law cannot be said to operate unequally, and therefore, in violation of the fourteenth amendment of the United States constitution, in the absence of a showing that the cost of travel is the same in all counties.—*Id.*..... 638

See PHYSICIANS AND SURGEONS, 2; WITNESSES, 4, 6.

CONTRACTS.

1. *Breach—Damages—Evidence.* In an action for damages for breach of contract to return plaintiff to Seattle at the close of the Alaska salmon season, evidence of the average earnings of fisherman in the waters of Puget Sound during the time plaintiff was detained therefrom after the close of the Alaska season was admissible, when it appeared that fishing was the fixed occupation of plaintiff, that he was the owner of appliances which enabled him to engage in that occupation, and was reasonably certain of employment in the waters of Puget Sound at his particular occupation.—*Johnson v. San Juan Fish & Packing Co.* 238
2. *Same.* In an action to recover damages for delay in transporting plaintiff, with his boat, fishing tackle and helper from Alaska to Seattle, a verdict allowing three dollars per day on account of the helper during the period of detention was erroneous, in the absence of evidence showing the reasonable value of such services to be worth that sum, the defendant not being bound by the contract rate of wages between plaintiff and his helper, nor by evidence of the value of such helper's services as a fisherman.—*Id.* 238
3. *Breach—Nonsuit.* In an action to recover for a breach of contract, a motion for nonsuit was properly denied, where it appeared that defendant had contracted with twelve laborers, as a partnership, for their services in excavating and tunneling along a railway line, that,

CONTRACTS—CONTINUED.

upon a change of route, six of the men quit work and refused to return, but that the others continued work under a new agreement whereby they were to receive a stated amount of cash for work done under the partnership contract and were to be paid days' wages for their future labor, and that defendant had committed a breach of such contract by refusing to make the cash payments, or to permit them to go on with the work after they had entered upon it under the new contract.—*Anderson v. McDonald*

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4. *Same*. Where a contract contemplates the making of cash payments for labor performed, the refusal to make such payments constitutes a breach, for which suit may be maintained.—*Id.*

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5. *Same*. Where defendant, after entering into a contract for the services of plaintiff's assignors, and upon the performance of which they had entered, told them that he had taken charge of the work himself, that there was nothing more for them to do, and that he would not pay them another cent, his conduct amounted to a refusal to permit them to proceed, and constituted such a breach as to warrant a recovery for the amount unpaid for services rendered.—*Id.*

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See CARRIERS, 3; COMPROMISE AND SETTLEMENT;
LANDLORD AND TENANT, 1; MASTER AND SERVANT,
2-5; SALES; VENDOR AND PURCHASER, 1.

CONVICTS. See CRIMINAL LAW, 19.

CORPORATIONS.

1. *Title to Office—Determination in Replevin Suit—Injunction*. The title to a corporate office cannot be tried in an action of replevin to recover the personal property of the corporation from an officer in possession of the office and performing its duties under a *bona fide* claim of right; hence an order of the court granting a temporary mandatory injunction directing the incumbent to turn over all the property and insignia of his office to a third party pending the determination of such action was erroneous.—*Standard Gold Mining Co. v. Byers*.....

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CORPORATIONS—CONTINUED.

2. *Conveyances—Authority of Officers to Execute—Presumptions.* The authority of officers of a corporation to execute a deed will be conclusively presumed, although there was no express authorization therefor, when it appears that the board of directors had by resolution given the president general authority to dispose of the corporate lands, for which he and the secretary were empowered to execute the proper deeds in behalf of the corporation; that the president sold certain lands under contract that the purchaser should erect thereon a flouring mill of certain capacity, which was done in accordance with the contract; that the officers and stockholders knew all about the transaction at the time, but did not attempt to repudiate the authority until long after the benefits of the conveyance had been received by the corporation.—*West Seattle Land & Imp. Co. v. Novelty Mill Co.* 435
3. *Same—Estoppel.* Where the officers of a corporation, under a general authorization to sell lands, sold and conveyed certain lands by quit-claim deed, in consideration of the expenditure of a large sum of money in improving same, and, on the discovery that the corporation had no title, a guaranty was given by the officers that title would be acquired from the state and transferred to the purchaser, and in reliance thereon the purchaser made the improvements with the full knowledge of the officers and stockholders of the corporation, who made no attempt to repudiate the transaction until long afterwards, the corporation is estopped from asserting ownership under the after-acquired title, on the ground that the transactions of the officers were in excess of their authority.—*Id.* 435
4. *Transfer of Stock—Action Against Corporation—Sufficiency of Complaint.* An action by an assignee of shares of stock, which had been subscribed for by his assignor, to compel the corporation to issue them to plaintiff does not state a cause of action when it fails to allege a transfer of the stock upon the books of the company or facts showing the duty of the company to enter the transfer, since it is provided in Bal. Code, § 4261, that such transfer shall not be valid, except between the

CORPORATIONS—CONTINUED.

- parties thereto, until the same shall have been entered upon the books of the company.—*Lacaff v. Dutch Miller Mining & Smelting Co.*..... 566
5. *Powers of Vice President—Employment of Counsel.* The acts of counsel for a corporation appointed by a vice president thereof are binding on the corporation, where the president had resigned and left the country, and the vice president was the acting president.—*Fernald v. Spokane & B. C. Tel. & Tel. Co.*..... 672
6. *Insolvency—Appointment of Receiver.* The action of the trial court in appointing a receiver for a corporation upon the application of a creditor will not be disturbed on appeal on a showing made that the corporation had been conducting a telephone business which it had recently abandoned upon a transfer of its franchises and business to another company; that it was allowing its entire tangible property, consisting of wires, poles and telephone instruments to go to ruin, without any effort to care therefor; and that the board of trustees cannot agree upon the management of its affairs, and that the company must continue without official management, unless a receiver be appointed.—*Id.*..... 673

See ATTORNEY AND CLIENT; BANKS AND BANKING;
PUBLIC LANDS, 2.

COSTS.

1. *Jury Fee in Civil Cases—Repeal of Statute.* The act of 1857 providing that a jury fee of \$12 shall be taxed as costs in civil actions was impliedly repealed by the general act on the subject of fees and costs, found in Laws 1893, p. 421, which enumerates the fees to be collected by clerks of superior courts, expressly stating that certain fees shall be collected in causes tried by a jury, but nowhere specifying a jury fee among them.—*Nelson v. Nelson Bennett Co.*..... 116
2. *Clerk's Fees—Collectible on Motion to Revive Judgment.* A motion to revive a judgment is in the nature of a new suit, for which the clerk is entitled to charge the fees provided by Laws 1893, p. 421, § 1, for the commence-

COSTS—CONTINUED.

ment of actions, even though all fees have been paid in full in the action in which the original judgment was rendered.—*State ex rel. Quincy v. Collins*..... 564

3. *Liability of County—Invalid Attempt of Supervisor to Collect Poll Tax.* An action by a road supervisor, under Bal. Code, § 3822, to enforce the payment of a road poll tax is a proceeding in behalf of the county, and hence where a judgment obtained by the road supervisor before a justice of the peace is vacated and set aside in the superior court, a judgment against the county for costs is warranted, inasmuch as the failure to obtain a valid judgment cannot be imputed to the justice and supervisor as a tort, so as to exonerate the county from liability.—*State ex rel. Dean v. Lamping*..... 652

See JUDGMENT, 6; TRIAL, 4.

COUNTIES. See COSTS, 3; EMINENT DOMAIN, 4.

COUNTY SUPERINTENDENT OF SCHOOLS. See CONSTITUTIONAL LAW, 3, 4.

COURTS.

1. *Jurisdiction of Superior Court—Injunction Against Execution Sale.* The superior court has the jurisdiction of an action whose subject matter is the restraining of an alleged illegal execution sale of property which lies within the territorial jurisdiction of the court.—*Noerdlinger v. Huff*..... 360
2. *Appellate Jurisdiction of Supreme Court—Validity of Statute.* Where the supreme court obtains jurisdiction of an appeal in an action in which the original amount in controversy does not exceed the sum of \$200, merely because of the fact that the validity of a statute is put in issue as to one of several causes of action included in the complaint, its jurisdiction extends only to the cause of action affected by the statute.—*Henry v. Thurston County* 638

See DEPOSITIONS; EMINENT DOMAIN, 4; EXECUTORS AND ADMINISTRATORS, 2; PROHIBITION, WRIT OF, 3; RECEIVERS, 2; WILLS, 1.

COVENANTS.

1. *Covenant of Warranty—Loss of Part of Land—Action for Breach—Measure of Damages.* The measure of damages for breach of a covenant of warranty, where title has failed to part of the tract conveyed, is such proportion of the consideration paid as the value of that part of the land to which the title has failed bears to the value of the whole tract, together with interest on such proportion.—*West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.*..... 610
2. *Same—Conditions of Contract of Sale—Merger in Deed.* In determining the purchase price of land with a view to fixing the measure of damages upon a breach of warranty, the value of improvements placed upon the land by the grantee cannot be included, although the contract for a conveyance was conditioned upon the erection of the improvement and the payment of the money consideration, inasmuch as such preliminary contract had become merged in the deed upon which the action was founded.—*Id.* 610

CRIMINAL LAW.

1. *Evidence—Record in Former Case—Objections to Relevancy.* A general objection to the competency and relevancy of the testimony given in another case and offered in evidence, will not permit appellant to urge the incompetency and irrelevancy of specific portions thereof, where the testimony, as a whole, was competent, material and relevant.—*State v. Douette.*..... 6
2. *Instructions—Duty of Jury to Disregard Verdict in Other Cause—Necessity for Requests.* The failure of the court in a perjury case to charge the jury not to consider as any evidence of the guilt of defendant the verdict and judgment included in the record of the cause in which the alleged false testimony had been given, and which record had been admitted in evidence in the perjury case as matter of inducement, could not be urged as error, where defendant had not requested instructions upon that feature of the case.—*Id.*..... 6
3. *Same—Harmless Error.* The action of the court in submitting the question of the materiality of alleged

CRIMINAL LAW—CONTINUED.

- false testimony to the jury, instead of charging that it was material, was not prejudicial, where the jury by their verdict found, in effect, that the testimony was material.—*Id.* 6
4. *Same—Elements of Crime.* The failure of the court, in charging the jury, to define the crime of perjury in the statutory language was not prejudicial, where the court instructed them as to what it was necessary to find beyond a reasonable doubt in order to convict defendant, and, in so doing, pointed out all the essential elements of the crime.—*Id.*..... 6
5. *Jurors—Competency—Waiver of Objections.* Under Bal. Code, § 4736, which provides that the verdict of a jury shall not be affected by reason of the incompetency of a juror, unless the juror was challenged for specific cause before verdict, a ground of objection to a juror will be deemed waived when the specific point was not urged as the basis of a challenge.—*State v. Lewis*..... 75
6. *Plea of Former Acquittal—Reply Unnecessary.* A plea of former acquittal does not stand admitted by reason of a failure to reply thereto, in the absence of a statute requiring the denial of such a plea.—*Id.*..... 75
7. *Same—Allegations of Plea.* *Semble*, that under Bal. Code, § 6900, requiring a plea of former acquittal to state the date of judgment, the absence of such allegation would render the plea bad.—*Id.*..... 75
8. *Instructions.* In a prosecution for embezzlement in which the state relied upon the relation of agency instead of that of attorney and client, the use of the descriptive word "attorney" in the court's charge, in referring to the defendant, would not constitute error, where the gist of the instruction dealt with the relation of agency.—*Id.* 75
9. *Meet Witnesses Face to Face—Waiver.* A defendant's constitutional right to have the witnesses against him produced in court may be waived; and an agreement by a defendant, in order to avoid a continuance, that one of the state's absent witnesses would testify to certain facts would constitute such waiver.—*Id.*..... 75

CRIMINAL LAW—CONTINUED.

10. *Evidence—Admissibility of Account Books.* In the prosecution of an attorney for the embezzlement of his client's money, the office books of defendant's firm, containing accounts with their general clientage, including the prosecuting witness, were properly excluded, where they contained self-serving entries made without knowledge of the prosecuting witness—*Id.*..... 75
11. *Prosecution for Embezzlement—Election Between Charges.* In a prosecution for embezzlement, a motion requiring the state to elect whether it relied upon the fiduciary relation of attorney and client or of principal and agent was fully met by the state's announcement that it elected to rely upon the fiduciary relation of principal and agent, and not that of attorney and client—*Id.*..... 75
12. *Misconduct of Prosecuting Attorney.* Misconduct of counsel cannot be urged on appeal, unless the trial court was asked to correct it, and to properly instruct the jury concerning same, followed by exception in case of the court's refusal.—*State v. Bailey.*..... 89
13. *Instructions—Charge as to Lesser Offenses.* Where there is no evidence tending to support lesser offenses than that charged in the information, it is not error for the court to fail to instruct the jury that they may return a verdict of guilty of the lesser offenses—*Id.*..... 89
14. *Instructions—Curing Error in Charge.* A misstatement in an instruction to the effect that justifiable homicide is the killing of one who "manifestly intends" to commit a felony against the slayer, was cured by the subsequent charge in the same instruction that a person may act in self-defense when he in good faith, as a reasonable man, has cause to believe that his life is in danger, whether the belief be founded on conditions which are real or only apparent.—*State v. Crawford.*..... 260
15. *Commencement of Trial—Indorsement of Witnesses on Information.* A trial does not begin until the acceptance and swearing of the jury, and the names of witnesses may properly be indorsed upon an information at any time prior to the commencement of the trial.—*State v. Lewis* 515

CRIMINAL LAW—CONTINUED.

16. *Bill of Particulars*. In a prosecution for embezzlement the refusal of the court to require a bill of particulars to be furnished is not erroneous, where the information presents a clear statement of facts in setting forth the facts constituting the crime with which defendant is charged.—*Id.* 515
17. *Former Jeopardy—Discharge of Jury on Holiday*. A holiday not being *dies non juridicus* but having only such sanctity as is attached to it by statute, the action of the court in discharging a jury in a criminal case on a holiday because of its inability to agree would not be a void act, under our statutes, so as to constitute former jeopardy entitling the defendant to a discharge.—*Id.*.... 515
18. *Pleading—Reply by State Unnecessary*. It is not necessary for the state to avoid by reply any defense set up in a criminal case, as the only pleadings provided by statute on the part of the state are the information or indictment.—*Id.* 515
19. *Trial of Convict Under Sentence Upon Another Charge*. The superior court of a county has jurisdiction to remove from the penitentiary a convict under sentence, for the purpose of trying him upon another charge and of re-sentencing him, in case of conviction, to a term beginning at the expiration of the current term which he is serving.—*Clifford v. Dryden*..... 545

See EMBEZZLEMENT; HOMICIDE; INDICTMENT AND INFORMATION; JURY, 1-9; JUSTICE OF PEACE; LARCENY; NUISANCE, 7; PHYSICIANS AND SURGEONS, 4; RAPE; ROBBERY; STATUTES, 1, 2.

DAMAGES.

Excessive Damages—Personal Injuries. A verdict for \$10,000 on account of personal injuries is excessive, where no bones are broken, no disfigurement inflicted, and the evidence of permanent impairment very slight, showing only an injury to the nervous system which might or might not remain permanently; it appearing that plaintiff though incapacitated for work more or less for a period of several months, and having suffered

DAMAGES—CONTINUED.

much pain, had been in bed from his injuries but six days, and that the trial court expressed grave doubts as to the justice of the verdict in passing upon a motion for a new trial.—*McDannald v. Washington & Columbia River Ry. Co.*..... 585

See CONTRACTS, 1, 2; COVENANTS, 1; DEATH BY WRONGFUL ACT; EMINENT DOMAIN, 1-4, 8, 9; EVIDENCE, 2; FORCIBLE ENTRY AND DETAINER, 5; PARENT AND CHILD; PERJURY.

DEMAND. See VENDOR AND PURCHASER, 3.

DEATH BY WRONGFUL ACT.

Excessive Damages. A verdict of \$10,000 for the death of a coal miner through defendant's negligence was excessive, where the deceased was a man fifty-five years of age, with an expectancy of life of seventeen years, and an earning capacity of \$50 per month, which could not presumably be continued without intermission until he was seventy-two years of age, especially in view of the fact that his employment had never been constant prior to the time of his death.—*Vowell v. Issaquah Coal Co.*.. 103

DEEDS.

Quitclaim Deed—Conveyance of After-Acquired Title. A quitclaim deed which recites that it remises, releases and quitclaims to the grantee certain lands, "to have and to hold all and singular the said described premises, together with the appurtenances unto the said party of the second part and to his heirs and assigns forever," is sufficient to pass an after-acquired title, under Bal. Code, § 4521, which provides that a statutory quitclaim deed does not convey after-acquired title, "unless words are added expressing such intention," and under Id. § 4538a, which provides that whenever any person sells land in the state without having title at the time, and afterwards acquires a title thereto, "such title shall inure to the benefit of the purchasers."—*West Seattle Land & Imp. Co. v. Novelty Mill Co.*..... 435

See COVENANTS, 1, 2; MORTGAGES, 1.

DENTISTS. See PHYSICIANS AND SURGEONS, 1-3.

DEPOSITIONS.

Power of Court to Issue Commissions in Probate Proceedings. The superior court has power to issue a commission to take depositions of witnesses in a proceeding in probate pending before it, either under the provisions of Bal. Code, § 6017 (Pierce's Code, § 979), authorizing testimony to be taken by deposition to be read in evidence in actions or proceedings pending in any court, or under Pierce's Code, § 2333, which expressly authorizes a probate court to issue a commission to take the depositions of witnesses.—*Reformed Presbyterian Church v. McMillan* 643

DISMISSAL AND NONSUIT. See APPEAL, 24, 28; CONTRACTS, 3; EQUITY, 1; OFFICE AND OFFICERS, 2.

DIVORCE.

1. *Alimony—Effect of Remarriage of Party Bound to Pay.* The subsequent remarriage of a divorced husband will not relieve him from the obligation of a decree to pay alimony for the support of his divorced wife and minor child, even if the additional burdens imposed by such remarriage tend to exhaust his earnings, since his divorced wife and child have a prior claim thereon, until the modification of the decree in a direct proceeding therefor.—*State ex rel. Brown v. Brown*..... 397
2. *Residence of Plaintiff.* Residence in the state and county a year prior to an action for a divorce is sufficiently established by evidence showing that plaintiff took up her residence in Seattle some twenty months prior to the commencement of action, and that, while she had been out of the state a portion of the time, it had merely been for employment, her baby having been left within the state and it having been her constant intention to make Seattle her home.—*Summerville v. Summerville*.. 411

DRAINAGE. See CERTIORARI.

ELECTIONS AND VOTERS. See SCHOOLS AND SCHOOL DISTRICTS, 2.

EMBEZZLEMENT.

1. *Claim of Lien for Attorney's Fees—Good Faith—Question for Jury.* In a prosecution of an attorney for the embezzlement of funds belonging to a client, the court is warranted in submitting the cause to the jury, although there may be a civil action pending between the attorney and his client involving the right to such funds under a claim of lien, when there is evidence tending to show that the claim of lien was not asserted in good faith.—*State v. Lewis*..... 75
2. *Evidence.* Under an information charging the embezzlement of a specific sum of money, proof of the receipt and conversion of a part of the fund is sufficient to sustain a conviction.—*Id.*..... 75
3. *Sufficiency of Information—Allegation of Agency.* Under Bal. Code, § 7119, which provides that, if any agent, clerk, officer, servant, or person to whom any money or other property shall be intrusted, with or without hire, shall fraudulently convert the same to his own use, he shall be guilty of larceny, an information sufficiently charges the crime of larceny by embezzlement, where it charges that defendant, as county auditor, received a county warrant, the property of another which was intrusted to him by virtue of his office, and which he afterwards fraudulently and feloniously converted to his own use.—*State v. Raby*..... 111
4. *Subject of Larceny—Undelivered County Warrant.* A warrant drawn by a county auditor and placed upon the files of the office, pursuant to the order of the commissioners upon an approved claim against the county, is a thing of value although never having been delivered to the proper owner.—*Id.*..... 111

See CRIMINAL LAW, 8, 10, 11, 16; INDICTMENT AND
INFORMATION.

EMINENT DOMAIN.

1. *Appropriation of Land for Drainage Purposes—Sufficiency of Petition.* A petition for condemnation of lands for ditch purposes, under Laws 1895, p. 142, is not demurrable for want of an averment that an offer to purchase

EMINENT DOMAIN—CONTINUED.

was made prior to the beginning of suit, since the statute is in the alternative, and authorizes the county commissioners to either purchase or condemn.—*Lewis County v. Schobey*..... 357

2. *Same*. The petition in a proceeding instituted by county commissioners for the condemnation of land necessary for the construction of a ditch need not set forth in exhaustive detail all the steps taken by the commissioners, but is sufficient if it notifies defendants in plain and specific language of the issues to be tried.—*Id.*..... 357

3. *Same—Damages—To Whom Assessable*. A judgment awarding damages for the appropriation of land for ditch purposes against the ditch district, which might be an irresponsible party, instead of against the county in whose name the action was instituted, would work no injury to the person whose property was damaged, where the judgment provided that the proceedings should stand abated unless the damages were paid within a specified time.—*Id.*..... 357

4. *Same—Costs*. Where proceedings for the appropriation of land for ditch purposes are instituted in the name of a county, but in reality for the benefit of a ditch district, which is the real party in interest, the district and not the county would be liable for the costs.—*Id.*.... 357

5. *Appropriation by Railway Corporation—State Lands Held Under Contract of Sale*. Under the power of eminent domain granted railway companies by Bal. Code, §§ 4333, 4334, which authorize them to condemn such "land, real estate, or premises" as may be necessary for right of way, such companies are empowered to appropriate the equitable interest in tide lands held by purchasers from the state under contract of sale, subject only to the right of re-entry and forfeiture on the part of the state for a failure to pay the balance of the purchase price according to the terms of the state's contract.—*State ex rel. Trimble v. Superior Court*..... 445

6. *Same—Condemnation Proceedings—Necessary Parties*. Under Bal. Code, § 5638, which provides that notice of condemnation proceedings shall be served on each and

EMINENT DOMAIN—CONTINUED.

every person named in the petition as owner, incumbrancer or otherwise interested therein, and that want of service of such notice shall render subsequent proceedings void as to the person not served, but all persons or parties served with notice shall be bound, the failure to serve all interested parties would not invalidate the proceedings against such as were included as parties and properly served with notice.—*Id.*..... 445

7. *Same—Lease of Road—Effect.* The fact that a railway company had leased its line of road to another corporation and does not operate its road nor possess any rolling stock of its own, would not deprive it of the power of condemning private property.—*Id.*..... 445

8. *Appropriation of Land—Measure of Damages.* In condemnation proceedings to appropriate a right of way for ditch and flume purposes through defendant's land, the measure of defendant's damages would be the value of the land taken, together with the decrease in value of the balance of defendant's lands lying in one continuous tract adjacent to that taken, but not the injury to other tracts which merely have a common corner and are not otherwise part of a continuous tract.—*Sultan Water & Power Co. v. Weyerhaeuser Timber Co.*..... 558

9. *Same—Resulting Injury to Right of Navigation.* Where lands are appropriated for the purpose of constructing a dam across a navigable stream with one end resting on the lands sought to be appropriated, damages by reason of the obstruction of navigation would not be an element for consideration in the condemnation proceedings, but it would be necessary to litigate such damages in another action brought for the specific purpose.—*Id.*.. 558

10. *Same—Public Use—Evidence.* Where the court has already adjudged that the appropriation of land for the construction of a dam across a stream was for a public use, it was not error for it to exclude evidence to the effect that the appropriator had stated the water was to be used as a fish pond.—*Id.*..... 558

See CERTIORARI.

EQUITY.

1. *Denial of Equitable Relief—Dismissal of Action.* Where the equitable jurisdiction of the court had failed by reason of the bad faith of plaintiffs in attempting to enforce a lien for more than they were entitled to, it was not error for the court to dismiss the action and compel plaintiffs to pursue their remedy at law.—*Robinson v. Brooks* 60
2. *Relief Warranted by Facts Established.* Under such circumstances, the facts alleged showed a case for specific performance, but, the jurisdiction of a court of equity having attached, the court was warranted in decreeing that title be quieted, inasmuch as the action was brought by one in possession and having the equitable title against the heirs of the intestate, and such relief is the equivalent of specific performance.—*Davies v. Oheadle*... 168
3. *Enforcement of Fraudulent Agreement.* A court of equity will not lend its aid to declare a trust in favor of plaintiff where it appears that plaintiff, while insolvent, had entered into an agreement with the holder of a first mortgage on his lands, against which there were liens held by a second mortgagee and judgment creditors, that such first mortgagee should foreclose thereon and plaintiff would allow judgment to go by default, after which such mortgagee was to declare a trust in favor of plaintiff; and that the mortgage was foreclosed for the sum of nearly \$17,000 in excess of the amount actually due, without the knowledge of other creditors, and the land sold and bid in for the amount of such excessive judgment.—*Snipes v. Kelleher*..... 386

See LIEN.

ESTOPPEL.

1. *Action by Father for Injury to Child—Estoppel by Emancipation.* In an action by a father to recover for personal injuries to his minor son, the court was warranted in granting a challenge to the sufficiency of the evidence, where it appeared that the son had brought an action in his own name through his father as guardian *ad litem* for the same injuries, which did not limit

ESTOPPEL—CONTINUED.

the right of recovery merely to the period after majority of the son; that the father actively assisted in the bringing, conducting, and settlement of the suit, without reserving any right to make a demand in his own behalf; that as the legal guardian of his son he consented to, and accepted the fruits of, the judgment entered, which recited that defendant should be released from all liability whatsoever because of the injury suffered by the son, upon payment of the sum agreed upon as the amount of the judgment.—*Daly v. Everett Pulp & Paper Co.* 252

2. *Pleading — Objections — Estoppel After Verdict.* After verdict a party is estopped to claim that the failure of an adverse party to deny certain allegations in his pleading amounts to an admission of their truth, where he not only went to trial as if the allegations had been denied, but introduced evidence to support their truth, and made no objection when counter evidence was offered, or when the question was submitted to the jury for their determination.—*Moynahan v. Interstate Mining, Etc., Co.* 417

3. *Estoppel to Assert Community Interest.* Where a husband procures an attachment sale of goods as the separate property of his wife, he is estopped from setting up a community interest therein as against one subsequently acquiring title through the wife.—*Standard Furniture Co. v. Van Alstine* 499

See BANKS AND BANKING; CORPORATIONS, 3; EVIDENCE, 1; PARENT AND CHILD; VENDOR AND PURCHASER, 2.

EVIDENCE.

1. *Admissibility of Parol—Evidence of Former Action.* In support of the defense of estoppel of a father to bring an action in his own name for personal injuries to a minor son, after participation in a suit and settlement in behalf of the son, parol testimony of the existence of the former suit and its settlement was admissible for the purpose of showing the father's participation

EVIDENCE—CONTINUED.

therein; and the record of the son's suit was also admissible as one of the facts tending to establish the defense.—*Daly v. Everett Paper & Pulp Co.*..... 252

2. *Opinions of Witness—Amount of Damages.* In an action for personal injuries testimony of the plaintiff as to the money value of his damages is inadmissible.—*DeWald v. Ingle*..... 616

See APPEAL, 3; CONTRACTS, 1; CRIMINAL LAW, 1, 10; EMBEZZLEMENT, 2; EXECUTION; HOMICIDE, 1-5; LANDLORD AND TENANT, 1; LIBEL AND SLANDER, 1, 2; MORTGAGES, 1; MUNICIPAL CORPORATIONS, 14, 15; NUISANCE, 5, 6; QUIETING TITLE, 2; RAILROADS, 1, 2; TROVER AND CONVERSION, 2; WILLS, 3; WITNESSES, 4, 6, 7.

EXECUTION.

Restraining Execution Sale—Evidence. In an action brought in one court to restrain an execution sale based upon the judgment of another court, evidence *dehors* the record is inadmissible for the purpose of impeaching the authority for the issuance of the execution.—*Noerdlinger v. Huff*..... 360

See MECHANICS' LIENS, 4.

EXECUTORS AND ADMINISTRATORS.

1. *Administration of Decedent's Estate—Preference Right of Husband—Waiver.* Where a surviving husband neglected for three years to apply for letters of administration upon the estate of his deceased wife, his preference right to appointment would not entitle him to the vacation of an order appointing another as administrator, when there is nothing showing the incompetency or unsuitability of the latter, since it is provided by §6141, Bal. Code, that if one entitled to administer shall neglect for more than forty days after the death of the intestate to apply for letters of administration, then the court may appoint any suitable and competent person to administer such estate.—*In re Sutton's Estate*..... 340

EXECUTORS AND ADMINISTRATORS—CONTINUED.

2. *Distribution of Estate—Determination of Distributees.* *Semble*, that under Bal. Code, § 6355, which makes it the duty of the superior court sitting in probate, upon the settlement of the final account, to distribute the estate among the persons who are by law entitled thereto, the court may determine who are entitled to the property. —*Reformed Presbyterian Church v. McMillan*..... 643
3. *Same—Action by Devisee—Limitations.* One claiming to be named in a will as a devisee has a right to maintain an action to establish such claim at any time before final distribution, regardless of the statute of limitations.—*Id.* 643

See APPEAL, 20; DEPOSITIONS.

EXPLOSIVES. See NEGLIGENCE, 1.

FIXTURES.

Dwelling House as Personal Property. A house built by consent of the city upon one of its unused streets, on condition that the builder would remove it upon notice from the city, and resting upon wooden blocks laid on the ground, so as to facilitate removal without disturbing the freehold, is personal property, even though by mistake the house may have been constructed so as to extend over the street line some seven feet upon an adjoining vacant lot.—*Page v. Urick*..... 601

See REPLEVIN.

FORCIBLE ENTRY AND DETAINER.

1. *Commencement of Action—What Statute Governs.* The provisions of Bal. Code, § 5532, requiring the filing of a complaint in actions of forcible entry and detainer prior to the issuance and service of the summons has been superseded by the subsequent enactment of the general law governing the commencement of actions and service of summons, as provided in Bal. Code, § 4869 *et seq.* (*Security Savings & T. Co. v. Hackett*, 27 Wash. 247, followed).—*McGrew v. Lamb*..... 485

FORCIBLE ENTRY AND DETAINER—CONTINUED.

2. *Pleading—Sufficiency of Complaint.* In an action of forcible entry and detainer, a complaint alleging entrance without right, by means of breaking open windows and doors, without permission of the owner and without color of title merely tenders an issue of right of possession, where it fails to embody in the complaint an abstract of plaintiff's title, as required by Bal. Code, § 5550, and therefore fails to state a cause of action involving title.—*Id.* 485

3. *Same—Right of Possession.* An allegation in a complaint that plaintiff is the owner of the fee simple is insufficient to show possession thereof, so as to warrant recovery in the summary action of forcible entry and detainer.—*Id.* 485

4. *Same—Pleading and Proof.* In an action to recover possession of land, an allegation in the complaint that plaintiff holds as owner is not supported by the admission of deeds showing a conveyance of the land to plaintiff's grantor, and from the latter to plaintiff, when the deed to plaintiff's grantor, though absolute on its face, was merely a mortgage to secure an advancement of money.—*Id.* 485

5. *Action by Tenant—Expiration of Lease—Effect.* Although a lease may have expired prior to the trial of an action by the tenant for forcible entry, the tenant may still recover in the same action damages flowing from the forcible entry and detainer, even if he no longer has a right to a precedent judgment for restitution.—*Cutler v. Co-Operative Brotherhood* 680

FRAUDS, STATUTE OF.

- Promise to Answer for Debt of Another.* The oral promise of bank officers to repay to the bank money that they have loaned out of its funds to an insolvent corporation is not binding, because a promise to answer for the debt of another, and not in writing.—*First National Bank of Pullman v. Gaddis* 596

GUARDIAN AND WARD.

Taxes—Payment by Guardian—Right to Lien. Where a guardian, in order to protect lands belonging to her wards, and owned by them as tenants in common with adult persons, pays delinquent taxes thereon from her own funds, such guardian is entitled to a lien against the lands for the amount so paid, even as against the adult owners, since she does not occupy the position of a mere volunteer, but is chargeable with the duty of protecting the interests of her wards.—*Burgert v. Caroline.* 62

HIGHWAYS. See **COSTS**, 3.

HOLIDAY. See **CRIMINAL LAW**, 17.

HOMICIDE.

1. *Evidence—Threats.* Where testimony as to a threat made by respondent is relevant, it is for the jury to determine whether or not it proves the fact for which it was introduced, and error could not be predicated on the court's refusal to strike it on the ground that the language testified to did not amount to a threat.—*State v. Crawford* 260
2. *Same—Dying Declarations—Surrounding Circumstances.* The circumstances under which a dying declaration was made affect its weight and credibility, and hence are admissible in evidence.—*Id.* 260
3. *Same—Absence of Malice—Fear of Deceased.* In a prosecution for murder, it was error to exclude testimony by the defendant as to whether he had any malicious feelings toward the deceased, and whether or not he was in fear of the deceased, since his feelings, motives or beliefs would be relevant to the issue of self-defense.—*Id.* 260
4. *Same—Reputation of Deceased.* The general reputation of the deceased as to going armed is admissible in evidence upon a trial for murder, where the defendant interposes the defense of justifiable homicide.—*Id.* 260
5. *Same—Rebuttal—Testimony of Wife as to Deceased's Firearms.* In a prosecution for murder, testimony by

HOMICIDE—CONTINUED.

the wife of the deceased as to the number and character of fire arms he owned, and whether he had any of them with him at the time of the affray, and also as to the time of day he reached home after being shot by defendant, was admissible for the purpose of tending to refute defendant's evidence offered in support of the claim of self-defense.—*Id.*..... 260

See CRIMINAL LAW, 14.

HUSBAND AND WIFE.

1. *Contract by Husband Alone—Ratification by Wife.* A wife who joins with her husband in an action for the cancellation of a contract for the sale of land and for a forfeiture of payments made thereunder, thereby ratifies the contract, though made by the husband alone for land in which each owns an undivided half interest as separate property.—*Whiting v. Doughton*..... 327
2. *Community Property—Lands Acquired Under Homestead Laws.* The community heirs of a deceased wife are entitled to a half interest in lands acquired under the homestead laws of the United States, although patent conveying the legal title thereto was not issued to the husband until after the death of his wife, where the equitable title had vested during the existence of the community.—*Ahern v. Ahern* 334
3. *Same—Status at Inception of Title Governs.* Where the inchoate title to land had its inception during the existence of the community, the legal title thereto, when acquired by a surviving spouse after the dissolution of the community by death, would inure to the benefit of the community heirs.—*Id.* 334
4. *Equitable Interest in Land—Liability for Separate Debt of One Spouse.* Equitable interests in land, held by a husband and wife as community property, are not subject to sale on an execution issued on a judgment rendered for the separate debt of either spouse.—*Ross v. Howard* 393
5. *Same—Distinction Between Real Property and Real Estate—Construction of Statute.* Bal. Code, § 4491,

HUSBAND AND WIFE—CONTINUED.

which provides that the husband has the management and control of the "community real property," but shall not sell, convey, or incumber the "community real estate," unless the wife join with him, does not recognize a distinction as existing between "real estate" and "real property," in view of the fact that those terms are used indiscriminately in the several sections of the statute relating to the acquisition and disposition of real property.—*Id.* 393

See DIVORCE; ESTOPPEL, 3; LANDLORD AND TENANT, 1, 2; MARRIAGE.

INDICTMENT AND INFORMATION.

1. *Sufficiency of Information—Bill of Particulars—Necessity for.* The denial of a bill of particulars upon a prosecution for larceny by embezzlement was not error, when the information showed that the defendant received certain property as an agent for another, which he fraudulently converted to his own use, and set forth a description of the specific property converted, with the time and manner of its receipt.—*State v. Lewis* 75

2. *Prosecution by Information.* Bal. Code, § 6813, which provides that "the grand jury shall inquire into the cases of parties in custody or under ball, charged with commission of offenses against the laws of this state, and duly returned by a committing magistrate, or upon a complaint sworn to before an officer authorized to administer oaths and presented by the prosecuting attorney, or under the instructions of the court," is inapplicable in cases where one is in custody under an information filed by the prosecuting attorney.—*State v. Cronney* 123

3. *Sufficiency of Information—Necessary Allegations.* In a prosecution by information, it is not necessary that the information should allege that the grand jury was not in session, or that defendant had been committed on said charge by a magistrate, although such facts must exist in order to authorize the filing of an information.—*State v. Lewis* 515

INDICTMENT AND INFORMATION—CONTINUED.

See EMBEZZLEMENT, 3; LARCENY; PERJURY, 1, 2; ROBBERY.

INJUNCTION. See ADJOINING LAND OWNERS, 1, 2; CORPORATIONS, 1; EXECUTION.

INSTRUCTIONS. See APPEAL, 12, 45; CRIMINAL LAW, 2-4, 8, 13, 14; MASTER AND SERVANT, 3-6; MUNICIPAL CORPORATIONS, 16; NUISANCE, 1-4; RAILROADS, 3; TRIAL, 5, 8, 10, 13, 15.

INTEREST. See MECHANICS' LIENS, 3; MUNICIPAL CORPORATIONS, 9.

INTOXICATING LIQUORS.

Revenue From Licensing—Disposition—Statutes—Repeal by Implication. Bal. Code, § 2934, which provides, among other things, that cities and towns shall pay into the state treasury ten per cent of the amount collected by them as license fees for the sale of intoxicating liquors has not been superseded or impliedly repealed by subsequent general legislation vesting municipalities with the license and control of the sale of intoxicating liquors, for the reason that the later enactments make no provision for the disposition of the funds arising from such licenses and hence, although doing away with some of the provisions of § 2934, cannot be regarded as a substitute therefore *in toto*.—*State v. Seattle*..... 149

JUDGMENT.

1. *Res Judicata—Matters Concluded.* A judgment giving a right of lien for support against lands conveyed by plaintiff in consideration thereof, but denying rescission based on the failure of defendants to support plaintiff, is not *res judicata* as to a subsequent action which seeks rescission on the ground of the cessation of the obligation to support by reason of the death of the grantee.—*Payette v. Ferrier*..... 43
2. *Expiration of Lien.* A judgment becomes dormant under the statutes of this state, at the end of five years from

JUDGMENT—CONTINUED.

the date of its rendition, and will not, until it is revived, support an execution.—*Hewitt v. Root*..... 312

3. *Limitation on Revival.* Where a motion for the revival of a judgment was made just before the expiration of the six-year limitation thereon, but notice thereof was not served on the adverse party until nearly two years thereafter, the judgment could not be revived, under Laws 1891, p. 165, which provides that no judgment shall be revived unless proceedings therefor shall be commenced within six years after the date of its rendition, inasmuch as the procedure did not follow the statute in force governing the commencement of actions and, in case of the inapplicability of that statute, the service did not follow upon the suing out of the writ within such a reasonable time as to constitute one continuous transaction.—*Hayton v. Beason*..... 317
4. *Collateral Attack—Presumptions—Jurisdiction of Persons.* As against collateral attack, it will be presumed, in support of a judgment obtained upon service made by a special constable, that the officer was properly appointed and had authority to act.—*Noerdlinger v. Huff*..... 360
5. *Same—Judgment of Justice—Attack in Superior Court.* Under Bal. Code, § 5136, when the judgment of a justice of the peace is certified to the office of the clerk of the superior court, it becomes, in effect, a judgment of the superior court, and subject to direct attack therein.—*Id.* 360
6. *Inclusion of Costs—Right to Retax.* The inclusion of costs in a judgment would not constitute error, when they were stated as a separate item from the verdict, inasmuch as there was nothing to prevent a change in the amount of costs on motion to retax.—*Shearer v. Town of Buckley* 370
7. *Revocation Before Entry—Power of Court.* Under Bal. Code, § 5119, which provides that "all judgments shall be entered by the clerk, subject to the direction of the court," an order of the court, though signed and handed to the clerk for entry, does not become a finality until its actual entry, but may be recalled, and modified or annulled, at any time before it has been spread upon the journal.—*State ex rel. Brown v. Brown*..... 397

JUDGMENT—CONTINUED.

8. *Judgment for Wrongful Replevin—Satisfaction.* A judgment awarding the return of goods or the recovery of their value on account of a wrongful replevy must be deemed satisfied and therefore unenforcible where it appears that the judgment is in favor of an attaching creditor who took the goods under an illegal writ of attachment which was reversed on appeal, and that the attachment debtor had subsequently surrendered all right in the replevied goods to the party who had sued out the writ of replevin.—*Standard Furniture Co. v. Van Alstine.* 499
9. *Default Judgment—Vacation—Discretion of Court.* The vacation of a default judgment upon a showing by the party defaulted that he relied on a settlement with plaintiff made out of court is a matter properly within the discretion of the trial court.—*McBride v. McGinley*... 573

See COSTS, 2; MORTGAGES, 2; NEW TRIAL, 1; PARTNERSHIP, 2, 3; PROHIBITION, WRIT OF, 1, 2.

JURISDICTION—See COURTS, 1, 2; CRIMINAL LAW, 19; EXECUTORS AND ADMINISTRATORS, 2; JUSTICE OF PEACE; PROHIBITION, WRIT OF, 3, 4; RECEIVERS, 2; WILLS, 1.

JURY.

1. *Justice of Peace as Juror—Ground of Challenge.* The provision of Bal. Code, § 4736, that judicial officers shall not be compelled to serve as jurors is merely a privilege granted such officers, and is not a ground of challenge for cause.—*State v. Lewis*..... 75
2. *Same.* The fact that the prosecuting attorney is the legal adviser of justices of the peace, and that a juror may have had cases before him as justice in which the prosecuting attorney was engaged for the state, would be too remote to disqualify a justice of the peace from sitting as a juror in a criminal case, when no special personal relations are shown to exist between the juror and the prosecuting attorney.—*Id.*..... 75
3. *Incomplete Panel—Rights of Accused.* The statutory provision respecting the number of jurors necessary to be provided for in the venire to fill incomplete panels

JURY—CONTINUED.

is one in the interest of the state, and does not give the accused a vested right in the number to be summoned.
—*State v. Cronsey*..... 122

4. *Qualifications of Juror—Prejudice.* In the examination of a juror it is not proper to ask him if he has a prejudice against a man who stands charged with a crime (FULLERTON, C. J., dissents).—*Id.*..... 122

5. *Same—Ground of Challenge—Bias.* Where a juror says that he has a feeling against crime and to some extent an opinion against one charged therewith, but would try the case upon the evidence and under the instructions of the court, regardless of any other consideration, he cannot be challenged on the ground of bias.—*Id.*..... 122

6. *Same.* The fact that a juror testified on his examination that he could not give the defense of insanity caused by the excessive use of intoxicating liquors the same weight as any other defense would not be ground of challenge, where his later examination showed that, when he understood from the court that insanity from intoxication was a defense under the law, he was willing to recognize such defense and give the defendant the benefit of the evidence thereon.—*Id.*..... 123

7. *Same—Impression Formed From Newspaper Accounts.* The impression formed as to defendant's guilt from reading a newspaper account of a crime, although requiring evidence to remove, is not such an opinion as would disqualify a juror from passing upon the guilt or innocence of the defendant, when he further testifies that such impression or opinion would not influence him in arriving at a just verdict based upon the testimony at the trial and the instructions of the court.—*Id.*..... 123

8. *Same—Feeling Against Insanity as a Defense.* Although a juror has testified that he could not impartially and fairly try a case where the defense was insanity caused by the excessive use of intoxicating liquors, yet he is not subject to challenge, where, after explanation by the court that insanity, from whatever cause, is a good and valid defense to every charge of crime, he answers that

JURY—CONTINUED.

he could give the defendant the benefit of every reasonable doubt upon the question of insanity.—*Id.*..... 122

9. *Same.* Where a juror answered that he could not give insanity caused by the excessive use of liquors the same weight as any other legal defense, but after the distinction between drunkenness and insanity caused by drunkenness had been explained to him, answered that he would undoubtedly give the defendant the benefit of such defense, he was not subject to challenge on the ground of bias.—*Id.*..... 122

See COSTS, 1; CRIMINAL LAW, 5; TRIAL, 2.

JUSTICE OF PEACE.

1. *Jurisdiction—Nuisance—Misdemeanor.* Under the jurisdiction given justices of the peace to punish misdemeanors, they have power to punish criminally persons guilty of the creation and maintenance of a nuisance, when made a misdemeanor, although justices have no jurisdiction of civil proceedings for the abatement of nuisances, because such action is especially enumerated by the constitution as being within the original jurisdiction of the superior court.—*State v. Schaffer*..... 305

See JUDGMENT, 5; JURY, 1, 2.

LACHES. See TRUSTS, 2.

LANDLORD AND TENANT.

1. *Establishment of Relation—Contract of Divorced Husband and Wife—Construction—Materiality of Evidence.* A husband and wife were divorced and certain real property was conveyed to the husband by the wife, under a written agreement that she should have the right to live there free of rent until her death, remarriage, or a *bona fide* sale of the property by the husband, in which event she was to be secured for the payment by him of the monthly value of the premises. The husband remarried and made a conveyance of the premises to his second wife, agreeing to pay the former wife, but without giving security therefor, the monthly value thereof if

LANDLORD AND TENANT—CONTINUED.

she would surrender possession, which was done by her, but, on failure to pay her the value of the monthly rental she brought an action against her former husband and his present wife on the theory that plaintiff had a life estate in the premises, that defendants were occupying it as her tenants, and had failed to pay the monthly rental agreed upon. The defendants sought to show that plaintiff's conduct on leaving was inconsistent with her theory of an interest in the property. *Held*, that evidence to that effect was properly excluded, as plaintiff's relations to the property should be determined by the terms of the written agreement, unless subsequently modified.—*Budlong v. Budlong*..... 228

2. *Same—Waiver of Relation.* Under an agreement that plaintiff held an estate in property which could be terminated only by death or marriage, or by a *bona fide* sale by the holder of the fee, with the rental value perpetually secured to her as long as she remained alive and unmarried, the yielding by her of possession to the holder of the fee and his wife, in consideration of the payment of a monthly sum, would not be inconsistent with her estate, where no provision was made for securing to her the monthly payments and these were merely treated by her as a rent charge; nor would the fact that such monthly payments to her were sometimes designated in the receipts as "contract money" change the relation of the parties from that of landlord and tenant to something else.—*Id.*..... 228

See FORCIBLE ENTRY AND DETAINER, 5.

LARCENY.

1. *Sufficiency of Information—Grand Larceny—Failure to Charge Stealing as Felonious.* An information charging grand larceny by alleging that defendant did "unlawfully steal, take, and carry away \$785.00," etc., states a crime within the definition of Bal. Code, § 7108, which defines grand larceny as the feloniously stealing, taking, and carrying away of the property of another of the value of thirty dollars or more, since the use of the word steal implies a felonious taking, and hence is sufficient,

LARCENY—CONTINUED.

under Bal. Code, §§ 6849, 6850, 6851, which provide that words may be used in an indictment or information conveying the same meaning as those used in the statute to define the crime; that the indictment or information is sufficient if it can be understood therefrom that the crime charged is set forth in ordinary and concise language, in such a manner as to enable a person of common understanding to know what is intended, and that matters formerly deemed defects should not affect the sufficiency of the information, when not tending to the prejudice of the substantial rights of the defendant.—*State v. Smith*..... 245

LIBEL AND SLANDER.

1. *Libel—Truth as a Defense.* In a civil action of slander or libel, the truth of the matter published is a complete defense.—*Leghorn v. Review Publishing Co.*..... 627
2. *Same—Variance.* In an action for libel on account of a newspaper article charging plaintiff with abstracting money from a "special postal fund", evidence that the fund was really a "deposit made with the postmaster, as a cash bond" by a newspaper to secure the payment of postage as required by law would not constitute such a variance as to invalidate the defense set up that the alleged libelous matter was true.—*Id.*..... 627
3. *Same—Sufficiency of Evidence.* Where there is no direct charge in a publication that plaintiff committed embezzlement in abstracting funds belonging to another for his own private use, but merely a statement of the facts, it would not be incumbent on defendant, in sustaining the truth of the charge, to prove all the elements of the crime of embezzlement.—*Id.*..... 627

LICENSES.

Pawnbrokers—License Fees—Excessiveness. A license fee of \$100 per annum upon the business of pawnbroking cannot, as a matter of law be said to be arbitrary and excessive, and therefore a tax on business, but, such business being a proper subject of police regulation, it

LICENSES—CONTINUED.

is within the province of the municipality to make the business bear the cost of surveillance, the fairness of which the courts will not inquire into on any mere difference of opinion between the municipal authorities and those engaged in the regulated business, in the absence of any proof on the question of the excessiveness of the charge.—*Seattle v. Barto*..... 141

See CONSTITUTIONAL LAW, 1, 2; INTOXICATING LIQUORS; PHYSICIANS AND SURGEONS; STATUTES, 1, 2.

LIENS.

Enforcement—Bad Faith. Where non-lienable items are wilfully and intentionally inserted in a claim of lien along with lienable items, a court of equity will refuse to enforce the lien or any portion of the claim.—*Robinson v. Brooks*..... 60

See MECHANICS' LIENS.

LIMITATION OF ACTIONS.

Waiver of Objection. Where a defendant did not raise the objection, either by demurrer or answer, that the cause of action was barred by the statute of limitations, until after trial and judgment and the case came back for retrial after reversal on appeal, the objection must be deemed as waived, under Bal. Code, § 4911, which provides that "if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same."—*Bay View Brewing Co. v. Grubb*..... 34

See EXECUTORS AND ADMINISTRATORS, 3; JUDGMENT, 3; MUNICIPAL CORPORATIONS, 10.

MALICIOUS PROSECUTION.

Probable Cause—Burden of Proof—Discharge by Committing Magistrate. The fact that plaintiff in an action for malicious prosecution had been discharged from a criminal charge without a trial upon the merits, while sufficient to make a *prima facie* case, would not shift the

MALICIOUS PROSECUTION—CONTINUED.

burden of proof in the action for damages to the
defendants.—*Noblett v. Bartsch* 24

See PARTNERSHIP, 1.

MANDAMUS.

1. *Alternative Writ—Insufficiency of Allegations.* An alternative writ of mandate to compel a municipal corporation to issue a warrant upon a judgment against it is demurrable for want of facts, when it fails to allege that the judgment was satisfied by petitioner and a certified copy thereof presented to the city, as required by Bal. Code, § 5676.—*Chapin v. Port Angeles*..... 535
2. *Same.* A petition for an alternative writ of mandate which refers to an affidavit filed in support of a prior writ that had been quashed is insufficient, where some of the necessary elements showing the right to the writ are omitted from the petition but are contained in such affidavit, and the affidavit is not served with the amended petition. (*State ex rel. King v. Trimbell*, 12 Wash. 440, distinguished.)—*Id.* 535
3. *Same—Issuance of Warrants Against Particular Fund.* An alternative writ of mandate does not state facts sufficient when it recites that petitioner is entitled to a warrant upon the current expense fund of the defendant city in satisfaction of a judgment, but no allegations are contained in the writ showing under what kind of contract the obligation which was merged in the judgment arose, nor against what fund it was a charge when the contract was made. (*Townsend Gas, etc., Co. v. Hill*, 24 Wash. 469, distinguished.)—*Id.* 535
4. *When Lies—Refusal of Public Officer to Discharge Duty—Remedy by Attachment—Adequacy.* The remedy provided by attachment, under Bal. Code, § 5677, against an officer of a public corporation who shall fail or refuse to satisfy a judgment against it in compliance with the provisions therefor in *Id.*, § 5676, would not exclude the remedy by mandamus, since the former would not be wholly adequate to compel the specific act affording the necessary relief to be done.—*Id.*..... 535

MARRIAGE.

Proof of Marriage—Sufficiency of Evidence. Upon an issue in a divorce case as to the marriage of the parties, the fact of marriage is sufficiently established, as against the husband's claim that merely a contract therefor was entered into which was void under the law of the place, where the undisputed evidence shows that they cohabited as man and wife, and held themselves out to the public as sustaining that relation, during which time they had offspring as the result of their union; and, upon the disputed question of whether a marriage ceremony preceded their cohabitation, the wife was sustained by corroborating circumstances in favor of such contention, while the husband, who contradicted her, was impeached in several particulars while giving testimony.—*Summerville v. Summerville* 411

MASTER AND SERVANT.

1. *Negligence of Master—Failure to Warn of Hidden Dangers.* Injury to a section hand as the result of a heavy boulder being thrown down by another section hand getting out rock from a sandy bluff above for riprap work is chargeable to the negligence of a fellow servant instead of the master, where the section foreman had ordered rocks to be thrown down suitable for a certain class of riprap work, and an inspection of the side of the bluff had shown the rocks to be of apparently small size, and the boulder causing the damage, although unsuitable by reason of size and shape, had been dug up where it lay imbedded and half concealed in the sand and then thrown down without warning, the foreman having no other or better means of knowledge of the dangers of the work than the section hand himself.—*Wilson v. Northern Pacific Ry. Co.* 67
2. *Contract of Employment—Construction.* A contract of employment made in the State of Washington, whereby defendant agreed to employ plaintiff at a stipulated salary, "for the time the work undertaken by the defendant at Manila should last," was not so indefinite and uncertain, either as to the commencement or duration of service, as to render the contract void.—*Prescott v. Puget Sound Bridge & D. Co.* 177

MASTER AND SERVANT—CONTINUED.**3. Same—Breach—Action for Discharge—Instructions.**

Where, in an action to recover upon a contract of employment, evidence that plaintiff began work at an earlier date than that fixed by the written contract had been excluded on the ground that it was a variation of a written instrument by parol, it was error for the court to charge the jury upon the question of defendant's liability by reason of the plaintiff having entered upon the services at a date earlier than the written contract.—*Moynahan v. Interstate Mining, etc., Co.*..... 417

4. Same. In an action to recover upon a contract of employment from which plaintiff had been discharged without the sixty days' notice provided by contract being given, the defense being that such a course was warranted by his gross breaches of contract, it was error to charge the jury that if the plaintiff was in the performance of his duties under the contract in good faith, in all its material particulars, "at the time" the defendant discharged him, then he could recover.—*Id.*..... 417

5. Same. Where the defendant, in order to justify the summary discharge of plaintiff, who was working for it under a contract of employment as its superintendent, had introduced evidence tending to show that plaintiff employed one dissolute woman as a cook and suffered another to occupy a house on the company's premises, and that he did not conduct himself properly with these women, it was error for the court, instead of treating the matter as an issue of fact for the jury to determine, to charge them that the question of plaintiff's moral or immoral conduct had nothing to do with whether he had discharged his duties under the contract.—*Id.*..... 417

6. Same—Waiver of Neglect of Duty. Where, in an action to recover upon a contract of employment, defendant had counterclaimed for money overpaid to plaintiff for time when he was not engaged in the services of defendant, a charge to the jury that "any payment by the defendant to the plaintiff for any services during any particular time would be a waiver of any fact of absence or neglect or failure to discharge his duties during that time, which had come to the knowledge of the defendant before the payment for that time," was misleading,

MASTER AND SERVANT—CONTINUED.

in view of the fact that plaintiff had paid himself monthly out of the defendant's funds in his hands, and defendant would not be estopped by the fact of payment, unless it had knowledge that there was a failure to discharge the duties for the particular time, knowledge that the time was paid for, and a delay for an unreasonable time in demanding repayment.—*Id.*..... 417

7. *Negligence of Master—Action by Servant—Question for Jury.* In an action to recover damages for injuries occasioned by defendant's negligence, a question for the jury is presented, where there was testimony to the effect that defendant had been taken away from his employment in another part of defendant's plant and directed by a vice principal to go upon a platform where the light was defective and remove a belt from the shaft for the purposes of repair; that in attempting to lift the belt he was caught and drawn around the shaft; that the belt was old, frayed and had laces, threads and fragments hanging from it; that the shaft was somewhat rough from rust and that these threads would have a tendency to catch and be drawn around it; and that plaintiff was caught by the buckling of the belt, thereby receiving the injuries complained of; there being conflicting testimony as to whether the belt had been properly handled by him for the purpose of removal.—*Goldthorpe v. Clark-Nickerson Lumber Co.*..... 467

8. *Assumption of Risk.* A workman is not barred from recovery under the doctrine of assumption of risk, although aware of the defective nature of an appliance in use, where the danger therefrom is not plainly discernible and he is ordered by a vice principal to proceed with the dangerous work, the workman having a right to assume that he is not going to be exposed to unnecessary perils.—*Id.*..... 467

9. *Safe Place to Work.* An employee of a saw mill who was injured by the giving way of a handrail against which he fell in attempting to cant a log on a log chute, cannot recover damages from his employer, where it appears that the rail was sufficient for its purpose—that of steadying persons passing up and down the chute—and

MASTER AND SERVANT—CONTINUED.

that the accident of falling against the rail while canting logs was one which a reasonably careful employer could not be held to anticipate.—*Decker v. Stimson Mill Co.* 522

10. *Unsafe Place to Work—Promise to Repair Defect—Exercise of Ordinary Care by Servant.* An employee who continues his work supported by the promise of the master to improve an unsafe place to work, and is injured by exposing himself indiscreetly to imminent peril in such unsafe place, cannot justify his own negligence as induced by a reliance on such promise to repair.—*Johnson v. Anderson & Middleton Lumber Co.*..... 554
11. *Same—Contributory Negligence.* A workman engaged in operating an edger which was not provided with a moving conveyor, as is customary, but with a stationary chute which occasionally became clogged and required clearing with a stick, cannot recover for injuries received in attempting to clear the chute in the dark, without stopping the machinery, when it appears that the place was dangerous for such work even in the light because of its cramped surroundings and the proximity of revolving shafts and saws.—*Id.*..... 554
12. *Injuries to Servant—Dangerous Appliances—Question for Jury.* The question of a railway company's negligence in erecting and maintaining cattle guards in close proximity to its tracks is one for the jury, where it appears that a trainman was injured by striking against one while attempting to board a car; that the guard was within about eighty-five feet of a customary stopping place, which required the trainmen to get off the cars in the discharge of their duties; and that the cattle guard posts were within twelve or fourteen inches of the cars at that point, while there appeared to be no necessity for such close location, and in fact at other points along the road such posts were located farther from the track.—*McDannald v. Washington & Columbia River Ry. Co.*..... 585
13. *Same—Assumption of Risk—Contributory Negligence.* The questions of plaintiff's contributory negligence and assumption of risks are for the jury, where it appears that he was the conductor of a freight train; that, after

MASTER AND SERVANT—CONTINUED.

stopping at a station, the train was slowly starting up again, and that plaintiff, in order to board it, ran to a road crossing and caught hold of the hand rail on the caboose; that at the moment his attention was called to an intending passenger running toward the train and his foot slipped off the car step and he was thrown against a cattle guard located about twenty-five feet beyond the point where he started to board the train; that he could have seen the cattle guard, if his attention had been called to it; that he did not know of its dangerous position in relation to the track; and that the posts of the cattle guard were much closer to the track than in his experience such posts were usually located, and were closer than any others along defendant's line of railway.—*Id.*..... 535

14. *Negligence—Liability of Master—Sufficiency of Evidence.* In an action by a servant for personal injuries, where there is no evidence, either direct or circumstantial, as to how the accident happened, but merely evidence of different causes that could have produced the injury, for some of which the master might have been liable, there can be no recovery unless it is established that the injury could have been produced in no other way than by some act or omission amounting to negligence on the part of the master.—*Hansen v. Seattle Lumber Co.* 604

See APPEAL, 31; DAMAGES; DEATH BY WRONGFUL ACT.

MECHANICS' LIENS.

1. *Foreclosure—Rescission of Building Contract—Subsequent Assignment—Rights of Assignee.* A building contract was abandoned by mutual consent of the parties, owing to the insolvency of the builder, and a lien was filed on the building for what was due the contractor. The premises were sold by the owner to another, to whom he assigned the building contract. The assignee demanded that the contractor proceed with the building, and upon his refusal, the assignee finished the building at his own cost. *Held*, in an action for the foreclosure of the contractor's

MECHANICS' LIENS—CONTINUED.

lien, that the assignee could not apply the sum expended in the completion of the building against the claim of the contractor, as the building contract had provided, since that contract had in fact been rescinded prior to its assignment.—*Huetter v. Redhead*. 320

2. *Same—Amount Due—Contract Price—Sufficiency of Evidence.* In an action to enforce a mechanic's lien for labor and material put into a building prior to the rescission of a building contract, the testimony of the superintending architect that on the date of the rescission he made an estimate of all the work done and materials furnished and put into the building and that the reasonable value thereof according to the contract price was \$15,193, to which should be added certain extras worth \$689.28, for which plaintiff was entitled under the contract, was sufficient evidence, uncontradicted, to show that the estimate of the work done was based upon the contract price and not upon the *quantum meruit*.—*Id.* 320
3. *Same—Interest.* The allowance of interest prior to the date of a lien notice was erroneous, where the lien notice did not claim interest, and the complaint for foreclosure of the lien asked for interest only from the date of filing the notice.—*Id.*..... 320
4. *Foreclosure—Personal Judgment—Enforcement Confined to Deficiency.* Under Laws 1893, p. 37, § 12, one who has obtained a judgment of foreclosure of a mechanic's lien, together with a personal judgment in the same proceeding against the party liable, cannot in the first instance issue a general execution on the personal judgment, but must first, under a special execution, sell the property upon which it is adjudged he has a lien, credit the proceeds thereof on his judgment, and issue a general execution for the balance, before other property than that liened upon can be seized and sold.—*Marks v. Pence*..... 428

MORTGAGES.

1. *Conveyance as Mortgage—Parol Evidence.* An absolute deed of conveyance, whether in form a warranty or

MORTGAGES—CONTINUED.

- quit-claim, may be shown by parol evidence to be a mortgage.—*Ross v. Howard*..... 393
2. *Foreclosure Decree—Collateral Attack—Irregularities—Publication of Summons Prior to Affidavit.* The publication of summons in a foreclosure proceeding prior to the filing with the clerk of the court of the affidavit showing the existence of the necessary facts for publication, as required by Laws 1893, p. 410, § 9, is merely an irregularity, which is insufficient on collateral attack to warrant any finding against the validity of the foreclosure decree.—*Tilton v. O'Shea*..... 513

See ATTORNEY AND CLIENT; PARTNERSHIP, 4; TRUSTS, 2.

MUNICIPAL CORPORATIONS.

1. *Ordinances—Singleness of Object.* An ordinance regulating and licensing the carrying on of business by auctioneers, second-hand dealers, bill posters, hotel runners, pawn brokers and persons engaged in the temporary sale of goods cannot be regarded as enumerating more than one object of legislation, as it has as its general purpose the protection of the public against certain occupations deemed inimical to the public good if allowed to be conducted without restrictions.—*Seattle v. Barto*..... 141
2. *Same—Sufficiency of Title.* Where the title of an ordinance states that it is "an ordinance to license and regulate certain trades and occupations in the city," it sufficiently expresses the object of the ordinance without enumerating in the title the several occupations mentioned in the body of the act.—*Id.*..... 141
3. *Street Improvements—Invalidity of Assessment—Reassessment.* Under Laws 1893, p. 226, which authorizes the making of a reassessment for the cost of public improvements when an assessment has been "set aside, annulled, or declared void by any court, either directly or by virtue of any decision of such court," a city would have jurisdiction to order a reassessment where

MUNICIPAL CORPORATIONS—CONTINUED.

a portion of an assessment had been invalidated at the suit of a part of the property holders affected thereby.

—*Young v. Tacoma*..... 153

4. *Same—Cost of Future Repairs—Inclusion in Assessment.* An assessment for the construction of a street improvement cannot, under the city charter of Tacoma, include an assessment for future repairs to be made to the work so constructed (*McAllister v. Tacoma*, 9 Wash. 272, followed).—*Id.*..... 153
5. *Same—Contract to Keep in Repair—Question for Jury.* A contract requiring a street contractor to give a bond to the city conditioned that he would at his own expense keep the work done by him in thorough repair from injury by traffic, decomposition and decay for the term of five years from the completion of the contract cannot be determined as a matter of law to be a provision for future repairs, but raises a question of fact to be determined from the evidence showing the quality of material employed and the effect of climatic conditions.—*Id.* 153
6. *Same—Deduction From Assessment of Added Cost of Repairs.* The mere fact that the expense of future repairs may have been included in the original assessment for a street improvement would not invalidate proceedings for a reassessment, but the added cost occasioned in view of the possibility of future repairs should be determined and deducted from the total amount, and reassessment made to cover the balance.—*Id.*..... 153
7. *Same—Objection to Assessment Not Raised Before City Council.* Objections to the inclusion in a street assessment of items for the expense of inspection and engineering on the improvement and of paving between the street railway tracks cannot be urged in the superior court, when they were not specially raised before the city council.—*Id.*..... 153
8. *Same—Cost of Street Crossings—Assessment Against Abutting Owners.* Where a city is given general power over street improvements, without any charter or statutory restriction as to the method of paying the cost

MUNICIPAL CORPORATIONS—CONTINUED.

- of street intersections, such cost may properly be assessed upon the property abutting on the street.—*Id.*... 153
9. *Same—Reassessment—Interest.* In making a reassessment for a street improvement, interest from date fixed for delinquency of the original assessment is properly included therein (*Lewis v. Seattle*, 28 Wash. 639, followed).—*Id.* 153
10. *Same—Limitations—Extension by Later Statute.* Where the limitation provided for the commencement of actions affecting street assessments was extended after the accrual of a cause of action thereon, but before the expiration of the limitation in force at the time of such accrual, actions on such street assessment would not be barred until the lapse of the extended period of limitation.—*Id.* 153
11. *Cities of Fourth Class—Defective Streets—Liability for Injuries.* A city of the fourth class is liable for injuries occasioned by a defective street, although no statute or charter expressly imposes such liability, where the exclusive control and management of its streets is granted to it, with power to raise money for their construction and repair.—*Sutton v. Snohomish*, 11 Wash. 24, followed).—*Shearer v. Town of Buckley*..... 370
12. *Same—Injury to Passenger in Vehicle—Proximate Cause—Contributory Negligence.* Where the complaint in an action for injuries alleged to have been received by reason of a defective street alleged that the defendant had knowingly permitted a hole or trench to remain open in a street without protection or notice to travelers, that it was so filled with muddy water as to conceal its real character and depth, that plaintiff, while driving a team of gentle horses, drove into said trench without fault on his part, and was thrown out of his wagon onto the tongue and whiffletrees, that the horses became frightened and dashed down the street, colliding with a tree, whereby plaintiff was thrown to the ground and received certain described injuries, it is not subject to demurrer, either on the ground that it shows the proximate cause of the injury as being other than the hole in the street, or on the ground that contributory negligence is shown on the face of the complaint.—*Id.*.. 370

MUNICIPAL CORPORATIONS—CONTINUED.

13. *Same—Nonsuit.* The defendant is not entitled to a nonsuit in an action for personal injuries occasioned by its alleged negligence in permitting an uncovered and unprotected hole to remain in one of its streets, when it appears that the hole, although claimed by defendant as a natural depression in black, muddy soil, filled after a rain with mud and water, had been allowed to exist in the same condition for several weeks prior to the accident, located within a few feet of the main-traveled and planked thoroughfare of the town; that plaintiff, although knowing and seeing that the place was very muddy, had driven deliberately into it, claiming that he was not aware of its depth, because of its having the appearance of the level surface of standing water.—*Id.*.. 370

14. *Same—Evidence—Complaints of Injuries.* In an action for personal injuries, complaints made by plaintiff a few days after the accident as to the nature and extent of his injuries are admissible in evidence, the weight of such testimony being for the jury to consider.—*Id.*..... 370

15. *Same—Other Defects.* Evidence of the condition of a street, other than at the exact place of an accident, but confined to a space within a block thereof, is admissible as tending to show constructive notice on the part of defendant of the defective condition of the street at the particular point in controversy.—*Id.*..... 370

16. *Defective Streets—Duty as to Entire Width—Injury to Traveler.* Conceding that it is the duty of a municipal corporation to keep only the traveled portion of a highway in repair, yet a charge to the jury that one traveling upon the street of a town, without any notice of a defect therein, has a right to presume that it is reasonably safe for ordinary travel throughout its entire width, would be no more than harmless error, where the evidence did not show that plaintiff's team in running into a hole in the highway, left entirely that portion of the street which was ordinarily traveled.—*Gallagher v. Town of Buckley*..... 380

See INTOXICATING LIQUORS; LICENSES; MANDAMUS, 1, 3, 4; NEGLIGENCE, 2; NUISANCE, 1-6; OFFICE AND OFFICERS, 1, 2; STATUTES, 2; TAXATION, 1-3, 5.

NEGLIGENCE.

1. *Deposit of Explosives on Vacant Lot—Injury to Children.* The placing of sticks of dynamite in a box upon vacant city lots upon which children are accustomed to play constitutes negligence, where the box is partially buried out of sight, but sufficiently exposed to be an object of attraction to children, to whom its contents are accessible by reason of deficient covering.—*Nelson v. McLellan* 208
2. *Imputed Negligence.* Where one is riding in a conveyance at the invitation of the driver, over whom or the team the passenger has no control, and is injured because of a defect in the street, the negligence of the driver cannot be imputed to the passenger.—*Shearer v. Town of Buckley* 370
3. *Contributory Negligence—Burden of Proof.* In actions for negligence contributory negligence is an affirmative defense, placing the burden of proof upon defendant to establish it.—*Gallagher v. Town of Buckley*.... 380

See CARRIERS, 1; MASTER AND SERVANT, 1, 7-14; MUNICIPAL CORPORATIONS, 11-16.

NEW TRIAL.

1. *Order Granting Cannot Be Vacated.* Where a court has granted a motion for a new trial, it cannot subsequently, under the belief that it committed error in so ruling, set aside such order and deny the motion. (FULLERTON, C. J., dissents).—*Coyle v. Seattle Electric Co.* 181
2. *Grounds—Improper Verdict.* The fact that the jury gave a verdict for just one-half of the amount claimed in an action for work under a contract providing a stipulated rate of wages is not ground for new trial, where one of the issues in the case was the amount of time actually spent by plaintiff and his assignors upon the work, defendant claiming that a portion of the men were often intoxicated and thus incapacitated for doing their work.—*Anderson v. McDonald*..... 274
3. *Amendment of Motion.* Amendments to a motion for a new trial are allowable after the motion has been made.—*Kreielsheimer v. Nelson* 406

NEW TRIAL—CONTINUED.

4. *Grounds—Premature Commencement of Action—Method of Raising Objection.* The objection that an action was prematurely brought must be pleaded to be available, and cannot be raised for the first time on motion for new trial.—*Leo Kee v. Wah Sing Chong*..... 678

See APPEAL, 27, 42.

NORMAL SCHOOLS. See SCHOOLS AND SCHOOL DISTRICTS, 3.

NUISANCE.

1. *Obstruction of Street—Delay in Building Bridge—Action for Damages—Instructions.* Where a railroad company under authority delegated by a city closes a street for the purpose of building a new bridge across a stream, such obstruction of the street would not constitute a nuisance if not maintained for more than a reasonable time, and hence, in an action by a property owner to recover damages to his business and property on account of such obstruction, it was not error to charge the jury that it would be necessary for him to show want of care and diligence on the part of defendant.—*Lund v. St. Paul, M. & M. Ry. Co.*..... 286
2. *Same.* In such an action, an instruction to the effect that if the obstruction of the street was continued by reason of the failure of the steel company from which material had been ordered to furnish the necessary structural steel, and not because of lack of diligence on defendant's part, then plaintiff could not recover was proper where the evidence showed that the defendant had forwarded the work with dispatch, except that portion requiring the steel, and that it had promptly contracted with the best equipped company in the country to furnish the required steel, which was a kind not kept in stock, but must be manufactured according to plans submitted, and that the steel company had been delayed by strikes and labor troubles.—*Id.*..... 286
3. *Same.* A charge to the jury to ignore any statement of counsel as to the liability of the steel company to reim-

NUISANCE—CONTINUED.

- burse defendant for any sum it might be required to pay on account of the steel company's delay was proper, since the liability of the steel company could not be an issue in the action against defendant for creating a nuisance.—*Id.*..... 236
4. *Same.* A charge to the jury that defendant would be liable under the same circumstances as would make the city liable, was not erroneous by reason of failing to state under what circumstances the city would be liable, where the court had already, in another instruction, clearly stated the conditions which would make the city liable.—*Id.*..... 236
5. *Same—Evidence—Loss of Profits.* The refusal to admit evidence showing plaintiff's receipts for a period of three months after the completion of the bridge, for the purpose of establishing by comparison the amount of his loss during the obstruction to travel, was not an abuse of the court's discretion in fixing the limit to be placed on the scope of such testimony.—*Id.*..... 236
6. *Same—What Admissible Under General Denial.* In an action based on defendant's negligence in failing to complete a bridge within a reasonable time, defendant was entitled, under the general denial, to introduce testimony as to the condition of the coal and steel markets, for the purpose of showing that the delay was occasioned by circumstances over which it had no control.—*Id.*..... 236
7. *Criminal Prosecution—Sufficiency of Complaint.* A complaint charging defendants with the creation and maintenance of a nuisance does not state facts sufficient to constitute a crime, either when it charges that the offense was committed some indefinite time in the past, without showing the acts as being within the period of limitations, or when it charges, in words of the present tense, without specifying the time as being before the filing of the complaint, that defendants are maintaining a nuisance.—*State v. Schaffer*..... 305

See JUSTICE OF THE PEACE.

OFFICE AND OFFICERS.

1. *City Officers—Removal From Office by Vote—Effect of Motion to Reconsider.* Where an ordinance creating an office provides that the incumbent may be removed upon the recommendation of the mayor, with the concurrence of the city council, one who has been removed in that manner and his successor duly confirmed can assert no right to hold the office by reason of the fact that motions to reconsider the votes, on his removal and on the confirmation of his successor were pending.—*State ex rel. Gill v. Byrne*..... 213
2. *Same—Title to Office—Cessation of Controversy.* Action to try title to an office should be dismissed on the ground of the cessation of the controversy, where, after the commencement of action brought pending a motion before a city council to reconsider plaintiff's removal, a vote on the motion had been taken adversely to plaintiff.—*Id.* 213

See CORPORATIONS, 1; MANDAMUS, 4.

PARENT AND CHILD.

Injuries to child—Action by Father—Estoppel. In an action by a father for loss of services of his minor son, resulting from injuries caused by defendant's negligence, it was not error to refuse to strike an answer averring that plaintiff had emancipated his minor son, so far as any claim for damages growing out of the alleged injuries was concerned, and had, with his own consent, advice, and assistance, permitted the son to bring an action in his own behalf for all damages, and that the father approved of the judgment entered in the action brought by the son, and, as the legal guardian of his son, received the money paid in satisfaction of such judgment.—*Daly v. Everett Pulp & Paper Co.*..... 252

See ESTOPPEL, 1.

PARTIES. See ADJOINING LAND OWNERS, 1; CARRIERS, 3; EMINENT DOMAIN, 6.

PARTNERSHIP.

1. *Wrongful Acts—Liability of Co-partners.* The fact that plaintiff was maliciously prosecuted upon a charge of

PARTNERSHIP—CONTINUED.

- larceny of partnership goods would not raise a presumption that all the partners participated in his prosecution, but in order to render all the partners liable proof of their complicity in the prosecution would be necessary.—*Noblett v. Bartsch*..... 24
2. *Action for Accounting—Judgment.* In an action for an accounting between partners, a court of equity has power not only to state the account between the parties, but to enter a money judgment in favor of one and against another, as the state of the account may require.—*Yarwood v. Billings* 542
3. *Same—Conversion—Outside the Issues.* Where a suit is in equity for an accounting and partition of personal property between partners, and not an action at law for conversion, the refusal of the court to enter judgment in favor of plaintiff for the value of the property would not be error, although defendants had refused to acknowledge his right of possession when demand was made upon them.—*Id.*..... 542
4. *Execution of Mortgage—Refusal of Partner to Join—Effect.* A mortgage executed in the partnership name by some of the members of a non-trading partnership, to secure money loaned the firm from time to time for the purpose of increasing its plant and property, is a valid lien on the whole of the property of the firm, although one of the copartners refused to join in its execution, there being no affirmative showing that he refused his assent to the execution of the mortgage by the partnership, but, on the contrary, that the debt was incurred with his knowledge, and that he had enjoyed the fruits of the money received thereby in the betterment of the partnership property.—*Matthies v. Herth*..... 665

See WITNESSES, 2.

PAWNBROKERS. See LICENSES.

PERJURY.

1. *Sufficiency of Information—Allegation of Jurisdiction.* Under Bal. Code, § 6857, which provides that it is suffi-

PERJURY—CONTINUED.

cient in an information for perjury to set forth the substance of the controversy in respect to which the crime was committed, and in what court or before whom the oath alleged to be false was taken and that the court or person before whom it was taken had power to administer it, and under art. 4, § 6, of the constitution, which vests the superior court with original jurisdiction in cases amounting to felony, the failure of the information to specially allege that the court had jurisdiction of the cause of action in which the alleged perjury was committed would not render the information bad, where sufficient was alleged to show it was a case of felony on trial in the superior court, thereby raising a *prima facie* presumption of jurisdiction.—*State v. Douette*..... 6

2. *Materiality of False Testimony.* Where an information charging perjury alleges that defendant was duly sworn as a witness, and, being so sworn, "it then and there, upon the trial of said issue, became and was a material inquiry," etc., and that defendant feloniously, falsely, and contrary to such oath, deposed and swore falsely to such material facts, it sufficiently avers the materiality of the testimony and that defendant testified falsely thereto after he was sworn.—*Id.*..... 6

See CRIMINAL LAW, 2-4.

PERSONAL PROPERTY. See FIXTURES.

PHYSICIANS AND SURGEONS.

1. *Dentists—Examination and Registration.* The proviso to § 1, of the act of 1901, amending the dentistry law of 1893, which excepts from the operation of the statutory requirements as to examination and registration of dentists, "persons engaged in the practice of dentistry at the time of the passage of this act who are *bona fide* citizens of the state of Washington," contemplates only those who were lawfully practicing at that date, and would not operate in favor of those who had been practicing as dentists in violation of the existing law at the time of the passage of the amendatory law.—*State ex rel. Smith v. Dental Examiners*..... 492

PHYSICIANS AND SURGEONS—CONTINUED.

2. *Same—Constitutional Law.* Laws for the regulation of the practice of dentistry fall within the power of the state, and hence are not unconstitutional on the ground of infringing the rights of the individual.—*Id.*..... 492
3. *Same—Statutes—Title of Act.* An act providing a penalty for practicing dentistry without a license is not unconstitutional because of the failure of the title to specify that the act provides for a penalty, since the title of the act, "An act to regulate the practice of dentistry in the state of Washington," is comprehensive enough to include the means necessary to effect the object sought by the statute.—*Id.*..... 492
4. *Physicians—Practicing Without License—Sufficiency.... of Evidence.* In a prosecution for practicing medicine without a license a conviction was unwarranted, where the only evidence thereof was the advertisement in a newspaper as a doctor of a person of the same name as defendant, since the jury would not be justified in inferring therefrom, as against the presumption of innocence, either that the advertisement was authorized by defendant or that he was the person named therein.—*State v. Dunham.*..... 636

PLEADING.

1. *Waiver of Demurrer—Filing Amended Complaint.* An erroneous ruling sustaining a demurrer to a complaint is waived by the filing of an amended complaint.—*Prescott v. Puget Sound Bridge & D. Co.*..... 177
2. *Sufficiency of Complaint Attacked on Trial.* Where a complaint is attacked by an objection to the introduction of any evidence in its support, on the ground that it does not state a cause of action, the attack will be treated as an attack on a complaint after verdict, when every reasonable intendment and legitimate inference susceptible of being drawn or deduced from the facts stated is permitted in aid of the statement of the cause of action.—*Id.*..... 177
3. *Amendment of Answer—Discretion of Court.* Where plaintiff had actual notice of a motion to amend an ans-

PLEADING—CONTINUED.

wer, made on the day of trial, and no injury was shown as the result of the amendment, its allowance by the court was not reversible error, although not supported by affidavit nor notice of the application served on the plaintiff, as required by Bal. Code, § 4953, since the same section permits the allowance of amendments in the discretion of the court to correct mistakes, and there is nothing in the record negating the idea that the amendment was allowed for the purpose of correcting a mistake.—*Daly v. Everett Pulp & Paper Co.*..... 252

4. *General Issue—Failure of Consideration.* A failure of consideration is not raised by an answer of general denial in an action on an instrument which imports a consideration.—*Nunn v. Jordan*..... 506

5. *Action on a Guaranty Bond—Allegation of Consideration.* A complaint on a guaranty bond is not demurrable for want of facts because it appears that the bond was executed a week later than the execution of the contract it guarantied, and there is no allegation of consideration for the guaranty, when the complaint sets out the bond in full, showing it to be an instrument under seal, which in itself imports a consideration.—*Considine v. Gallagher* 669

See APPEAL, 24, 25; CANCELLATION OF INSTRUMENTS; CARRIERS, 2, 3; CORPORATIONS, 4; CRIMINAL LAW, 6, 7, 16, 18; EMINENT DOMAIN, 1, 2; ESTOPPEL, 2; FORCIBLE ENTRY AND DETAINER, 2, 3; LIMITATION OF ACTIONS; MANDAMUS, 1, 2; NEW TRIAL, 4; NUISANCE, 6, 7; QUIETING TITLE, 1; TRIAL, 7; TROVER AND CONVERSION, 1.

PRINCIPAL AND AGENT. See TELEGRAPH AND TELEPHONES, 1.

PRINCIPAL AND SURETY. See APPEAL, 47.

PROCESS.

1. *Service by Non-resident Attorneys.* Non-resident attorneys who have been admitted to the bar of this state are authorized to issue summons in actions in this state, and

PROCESS—CONTINUED.

may perform this act outside the state as well as within its borders, provided the summons specifies a place within the state where an answer thereto may be served, within the meaning of Bal. Code, § 4870, which provides that the defendant shall "answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the state therein specified in which there is a postoffice."—*Wagnitz v. Ritter*..... 343

2. *Form of Summons—Statutory Requirements.* A summons issued in conformity with the form set forth in the statute, and which substantially follows the sections enumerating the necessary contents of the summons, is good as against a general objection that it is void on its face, raised for the first time on appeal, even if the summons may not have fully incorporated everything required by other sections of the statute.—*Id.*..... 343

See APPEAL, 21, 48; FORCIBLE ENTRY AND DETAINER, 1; MORTGAGES, 2.

PROHIBITION, WRIT OF

1. *To Superior Court—Vacation of Judgment Affirmed on Appeal—Hearing in Lower Court.* The writ of prohibition will not issue to restrain a judge of the superior court from trying a petition for the vacation of a judgment which had been affirmed on appeal, but which the supreme court, upon showing made, had permitted to be attacked in the lower court, when the judge of such court makes a showing that he will try such petition according to the law and the evidence, unbound and unrestricted by the action of the supreme court in passing upon the sufficiency of the showing made.—*State ex rel. Post v. Superior Court*..... 53
2. *Same—Remedy by Appeal.* The fact that a petition for the vacation of a judgment was docketed by the clerk as a separate proceeding, and that there is no appeal from an order vacating a judgment, would not afford grounds for the issuance of a writ of prohibition to restrain the superior court from hearing same, since the proceeding must in effect be regarded as within the

PROHIBITION, WRIT OF—CONTINUED.

action in which the judgment sought to be attacked was rendered, and an appeal from such judgment would bring up for review the orders of the court in regard to its vacation.—*Id.*..... 53

3. *When Lies—Amount in Controversy.* The fact that the superior court has no jurisdiction to try and determine an appeal from a justice of the peace is not ground for the issuance of a writ of prohibition, where the amount in controversy is less than \$200, since the judgment of the superior court is conclusive in such cases, under the constitutional provisions limiting the appellate jurisdiction of the supreme court.—*State ex rel. Fuller v. Superior Court.*..... 98

4. *Same—Remedy by Appeal.* The writ of prohibition will not issue to restrain a superior court from proceeding with an action which it had refused to dismiss for want of jurisdiction, as the party aggrieved has an adequate remedy by appeal.—*State ex rel. Port Orchard Investment Co. v. Superior Court.*..... 410

5. *When Lies—Inadequate Remedy by Appeal.* The writ of prohibition will issue against the superior court in favor of a defendant on whose motion a receiver was discharged, from which order appeal was taken by plaintiff and the control of the receiver superseded during appeal, since there is no remedy by appeal for the defendant, the only appealable order, if any, being the one in his favor for the discharge of the receiver.—*State ex rel. Oudin v. Superior Court.*..... 481

PUBLIC LANDS.

1. *Railroad Grants—Sale of Lands Excluded From Grant—Preference Rights of Purchaser.* Under 24 St. at Large, 557, § 5, which provides that where any railway company shall have sold to citizens of the United States as a part of its land grant from the government lands coterminous with the constructed portion of its road, but which are for any reason excepted from the operation of its grant, the *bona fide* purchaser may make payment to the United States at the government price and

PUBLIC LANDS—CONTINUED.

shall thereupon be entitled to patent, one who had in good faith purchased the land from the railroad company, and, upon the decision of the land department adverse to the railroad's right to the land, had applied within a reasonable time to make purchase under the above act of congress, had a preference right as against a homestead entryman, who had made entry within four months after notice of cancellation of the railroad's right to the land, and with actual knowledge of all the facts.

—*Ramsay v. Tacoma Land Co.*..... 351

2. *Same—Citizenship of Corporations.* A corporation organized under the laws of any state is a citizen of the United States within the meaning of 24 St. at Large, 557, authorizing citizens of the United States, in certain cases, to purchase government lands.—*Id.*..... 351

See HUSBAND AND WIFE, 2, 3; SCHOOLS AND SCHOOL DISTRICTS, 3.

QUIETING TITLE.

1. *Possession Under Oral Contract to Devise—Sufficiency of Complaint.* In an action to enforce a contract for a conveyance of land and quiet title thereunder, the complaint states a cause of action when it sets up an oral agreement for the devise of land to plaintiff in consideration of the care of the grantor in his life-time; that plaintiff was put in possession of the land under said agreement and is still in possession thereunder; that the grantor failed to convey or devise said land to her; that she fully performed and discharged her obligations under the contract by caring for the grantor until his death; and that nothing remains undone to fully execute the contract except a formal conveyance of the legal title.—*Davies v. Cheadle* 163
2. *Same. Admissibility of Evidence.* Where it is sought to establish an oral contract between parties, the unilateral written agreement of one of them is admissible in evidence as a declaration on his part concerning the subject-matter of the alleged oral contract.—*Id.*..... 163

See EQUITY, 2.

RAILROADS.

1. *Fires Along Right of Way—Evidence of Origin.* In an action to recover damages for fire set out by the passing engines of defendant, in which no particular engine is assigned as the direct cause of the injury, evidence that defendant's engines were in the habit of emitting sparks upon the right of way and that other fires had been caused thereby, was admissible as a circumstance tending to show the origin of the fire, where that was a disputed question.—*Noland v. Great Northern Ry. Co.* 430
2. *Same—Pleading and Proof—Variance.* In an action for damages for fire caused by defendant's engine, evidence of the inflammable condition of the right of way was inadmissible, where there was no charge of negligence in the complaint as to the improper and careless maintenance of the right of way.—*Id.*..... 430
3. *Same—Instructions.* Where a complaint charged defendant's negligence as consisting of carelessness in operating its locomotives and in allowing fire to spread over its right of way and upon its lands, it was error for the court to charge the jury as to the duty on the part of defendant in the matter of providing engines with the best appliances for arresting sparks, of keeping such appliances in repair, and of keeping its right of way free from combustible materials.—*Id.*..... 430

See EMINENT DOMAIN, 5-7.

RAPE.

1. *Sufficiency of Evidence.* A verdict of guilty in a prosecution for rape will not be disturbed, although the testimony of the prosecuting witness may have been contradictory in some particulars, where it appears that she was a child of twelve years of age, apparently confused and embarrassed by her position as witness and by the nature of the examination, and where her statements as to the commission of the crime are supported by corroborative testimony.—*State v. Bailey*..... 89
2. *Same—Impotency.* Where the only evidence as to the impotency of a defendant charged with rape is his own

RAPE—CONTINUED.

testimony, a verdict of guilty will not be disturbed, when there is evidence tending to establish the material facts showing guilt.—*Id.*..... 89

RECEIVERS.

1. *Temporary Receiver—Application for Appointment—Service of Notice.* Under Bal. Code, § 4886, which provides that one who has appeared in an action is entitled to notice of all subsequent proceedings, which notice, under *Id.*, 4886a, shall be at least three days' notice, in the case of motions and applications, four days' notice of the filing of an amended complaint and of a motion for the appointment of a temporary receiver thereunder was sufficient, when served upon the attorney for defendant who had appeared generally in the action and demurred to the original complaint.—*Haggard v. Sanglin* 165
2. *Appointment by Courts of Concurrent Jurisdiction—Exclusive Control Belongs to First Appointee.* Where the superior court of one county has appointed a general receiver for an insolvent corporation with power to take possession and control all its property, it is error for the superior court of another county to appoint either the same or another person receiver for such corporation, even if done on the theory that the subsequent appointment was merely to extend the existing receivership to a foreclosure suit against the corporate property.—*Fernald v. Spokane & B. C. Telephone, etc., Co.*... 219
3. *Discharge—Appeal—Effect of Supersedeas.* Where the discharge of a receiver follows as a matter of course upon the affirmance of the final judgment in a cause which makes no provision for the retention of the receiver, an order for the discharge is self-executing, and the filing of a supersedeas bond on a second appeal would not reinstate the receiver, or authorize the court to maintain possession of the property pending appeal.—*State ex rel. Oudin v. Superior Court*..... 481

See CORPORATIONS, 6; PROHIBITION, WRIT OF, 5.

RESCISSION. See CANCELLATION OF INSTRUMENTS; JUDGMENT, 1; MECHANICS' LIENS, 1.

REPLEVIN.

Conditional Sale of Building—Recovery as Personal Property. Where a dwelling house was personal property, and was sold under a conditional contract of sale, on a breach of the conditions of sale the house could be recovered in an action of replevin by the vendor.—*Page v. Urick* 601

See CORPORATIONS, 1; JUDGMENT, 8.

ROBBERY.

Sufficiency of Information—Allegation of Ownership of property. An information charging larceny committed by unlawfully and feloniously stealing and taking away certain property from the person of another is insufficient when it fails to allege the ownership of the property (*State v. Dengel*, 24 Wash. 49, followed).—*State v. Morgan* 226

SALES.

Void Contract—Right of Possession—Attachment. The fact that a contract for the sale of goods for an immoral purpose was unenforceable would not entitle an attaching creditor of the vendee to hold them as against the vendor, to whom the vendee had surrendered all right and title to the goods.—*Standard Furniture Co. v. Van Alstine* 499

See REPLEVIN.

SCHOOLS AND SCHOOL DISTRICTS.

1. *School Districts—Petition for Union—Timeliness of Action On.* Where a petition for the union of two school districts was not acted upon by the board of directors of one of the districts until more than a year after its presentation to them, and in the meantime the board had submitted to vote another petition for a union of districts, including the two in the original petition

SCHOOLS AND SCHOOL DISTRICTS—CONTINUED.

- with others, which was submitted to a vote of the district and rejected, the board would be without power to submit the original petition, since it must be deemed as waived by failure to act upon it within a reasonable time, and by the act of submitting a later petition to popular vote.—*Peth v. Martin*..... 1
2. *Same—Notice of Election—Sufficiency.* A notice of election to determine the question of a union of school districts, which fixes the opening of the polls at 4 o'clock, p. m., and fails to designate the hour of closing, is illegal, under the mandatory provisions of Bal. Code, § 2420, which provides that such notices shall designate the "hours between which the polls are to be kept open," and that, "unless otherwise designated in the notice of election, the polls shall be open at 1 o'clock in the afternoon, and close at 4 o'clock in the afternoon; but the board of directors may determine on an hour before 1 o'clock, but not earlier than 9 o'clock in the forenoon, for opening the polls, and for closing an hour after 4 o'clock, but not later than 8 o'clock in the afternoon."—*Id.*..... 1
3. *School Lands—Proceeds of Sale—Statute Authorizing Invasion of Principal—Conflict With Enabling Act.* The act of March 7, 1895 (Laws 1895, p. 55) providing for the creation of a state normal school fund into which shall be paid all proceeds from the sales of lands granted to the state of Washington by the United States for normal schools, and authorizing the payment of the cost of erection of normal school buildings from such fund is void, because in conflict with the provisions of the enabling act for the admission of this state into the Union, wherein it is provided (§ 11) "that all lands herein granted for educational purposes shall be disposed of only at public sale, . . . the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools."—*State ex rel. Heuston v. Maynard*..... 133

See CONSTITUTIONAL LAW, 3, 4.

SHERIFFS AND CONSTABLES. See JUDGMENT, 4.

STATUTES.

1. *Barbers—Regulation and Licensing of Occupation—Title of Act.* The title of an act reciting that it is "an act to regulate the practice of barbering and licensing of persons to carry on such practice, and providing punishment for its violation," is broad enough to embrace provisions in the act for the appointment of a board of examiners, and their duties and compensation, for the regulation of apprentices, and for the payment of license fees.—*State v. Sharpless* 191
2. *Same—Application of Act.* An act making it "unlawful for any person to follow the occupation of barber in any incorporated city or town in this state," under certain conditions, is not restricted in its application to such municipalities only as were incorporated at the time of its passage.—*Id.* 191
3. *Reason for Enactment—Province of Legislature.* Courts will not pass upon the sufficiency of the reason for the enactment of a law, which is not in conflict with some constitutional provision.—*Id.* 191

See COSTS, 1; COURTS, 2; FORCIBLE ENTRY AND DETAINER, 1; HUSBAND AND WIFE, 5; INTOXICATING LIQUORS; MUNICIPAL CORPORATIONS, 1, 2; PHYSICIANS AND SURGEONS, 3.

TAXATION.

1. *Delinquency Certificate—Priority of Lien Over Street Assessment.* The holder of a general tax delinquency certificate is entitled to enforce same by foreclosure, without being compelled to pay or tender the delinquent street assessments which may be an existing lien upon the lands included in his certificate.—*Keene v. Seattle*... 202
2. *Same.* Laws 1893, p. 169, § 8, allowing cities of the first class to collect street assessments according to the method of collection of general taxes, and authorizing the same procedure as if such assessments were part of the general tax assessed against such property, does not place the lien for such assessments on an equality with the general tax lien, in the absence of an express provision to that effect and in view of the evident policy

TAXATION—CONTINUED.

- of the law in favor of the priority of general tax liens.
 —*Id.* 202
3. *Delinquency Certificate—Tender of Street Assessment Unnecessary.* An applicant for a general tax delinquency certificate is not required to pay the delinquent street assessments as well as the general taxes constituting liens on the real estate, in order to entitle him to a certificate of delinquency for general taxes thereon.—*State ex rel. Craver v. McConnaughey*..... 207
4. *Foreclosure of Delinquency Certificate—Appeal—Deposit of Taxes Necessary.* Under Laws 1897, p. 186, § 104, which provides that no appeal shall be allowed from the judgment upon foreclosure of certificates for delinquent taxes, unless the party praying the appeal shall, before taking such appeal, deposit with the county treasurer an amount equal to the judgment and costs, an appeal by a delinquent taxpayer will be dismissed, where such deposit has not been made (*Meagher v. Hand*, 28 Wash. 332, distinguished).—*Schultz v. Harris*..... 302
5. *Tax Sale—Sale by City of Third Class—Interest Acquired by Purchase—Right of Redemption From Other Sales.* Where a city of the third class became the purchaser of land at a city tax sale which was conducted in pursuance of the provisions of Bal. Code, § 945, authorizing both summary procedure and action in court for the enforcement of delinquent taxes, the return of sale, although irregular, with the judgment and confirmation of sale, and the entry by the city into possession of the property, together constituted evidence of the ownership of such interest in the land, within the meaning of Bal. Code, § 1752, as would entitle the city to redeem from a subsequent certificate of delinquency issued by the county to one who had knowledge of the city's possession and assertion of ownership.—*Meagher v. Sprague* 549
6. *Same—Redemption—Sufficiency of Payment—Right to Raise Question.* The question of whether the county had exacted the full amount due for delinquent taxes upon the issuance of a complete certificate of redemption cannot be litigated in an action to foreclose a delinquency

TAXATION—CONTINUED.

certificate, where the county is not a party to the action.

—*Id.* 549

See GUARDIAN AND WARD.

TELEGRAPHS AND TELEPHONES.

1. *Telegraph Companies—Liability for Mistake in Telephoning Message—When Messenger Agent of Addressee.* Where the person to whom a telegraph message was sent asked the messenger of the company to telephone him the contents of the telegram because he was outside of the free delivery district, he thereby constituted such messenger his own agent, and a mistake by the messenger in transmitting the contents of the telegram could not be chargeable against the company on the theory of ratification of his acts from the fact of his being in their employ and using a telephone in their office to repeat the message, with the knowledge of the telegraph operator, when there is nothing to show that the operator heard the message read over the telephone, or knew that a mistake had been made.—*Norman v. Western Union Telegraph Co.* 577
2. *Same—Delivery of Message—Sufficiency.* Any delivery of a telegraph message which, in law, would be good as between the receiver of the message and the company is good as between the sender and the company.—*Id.* 577

TIDE LANDS. See EMINENT DOMAIN, 5.

TRIAL.

1. *Misconduct of Attorney—Indulgence in Collateral Remarks.* The fact that attorneys in the course of a heated trial indulged in collateral remarks, not pertinent to the issues, would not be ground for reversal, in the absence of a showing that the jury was unduly influenced thereby to the prejudice of the adverse party.—*Vowell v. Issaquah Coal Co.* 103
2. *Jurors—Misconduct—Conversation With Party.* The refusal of the court to discharge a jury during trial

TRIAL—CONTINUED.

because one of the jurors and one of the plaintiffs had indulged in a conversation together during an intermission was not error, where it appeared that the talk had by them was not upon the subject of the trial, was publicly had in the corridor of the court house before many people and in the presence of some of them, and there was no showing indicating intrigue between the juror and the party.—*Id.* 103

3. *Directed Verdict—Bills of Exchange—Waiver of Necessity for Written Acceptance of—Failure of Proof.* In an action by plaintiffs upon an unaccepted order for the payment of money, which, under Laws 1899, p. 362, § 126 *et seq.*, would not bind the drawee unless accepted in writing, it was error to refuse a directed verdict in defendant's favor, where the allegations of the complaint as to an agreement obviating the necessity for a written acceptance were wholly unsupported by evidence.—*Nelson v. Nelson Bennett Co.*..... 116

4. *Stay of Proceedings Until Payment of Costs in Other Action—Power of Court.* An order of the court staying proceedings in an action, until a judgment against plaintiff for costs in a prior action between the same parties involving the same subject-matter was paid, is a valid exercise of the court's powers.—*Plumley v. Simpson.*.... 147

5. *Instructions—Weight of Expert Evidence.* Expert testimony, being competent testimony under the law, must go to the jury as any other testimony in the case, and it is error for the court to discriminate in any way against its weight in instructing the jury.—*Nelson v. McLellan* 203

6. *Theory of Parties as to Construction of Contract.* In an action for damages for breach of contract, which was tried by both parties on the theory that a written memorandum between them did not contain all of the contract governing one of the elements of damage, the defendant would not be entitled to have withdrawn from the jury the evidence relating to such item of damages, because of its not being within the provisions of the written memorandum.—*Johnson v. San Juan Fish & Packing Co.* 238

TRIAL—CONTINUED.

7. *Withdrawal of Evidence From Jury—Improper Attack on Obscure Pleading.* The fact that the allegations of a complaint are not so full and particular as they should be respecting any issue cannot be taken advantage of by motion to withdraw from the jury the evidence upon such issue, where the allegations are sufficient to advise defendant of the nature and amount of the demand against him.—*Id.* 238

8. *Instructions—Harmless Error—Comment on Facts.* Error of the court, if any, in referring to the facts in a case in charging a jury was cured by further instructions in which the jury were told that any reference made to the facts was not intended as an intimation of any opinion of the court, and that they were the sole judges of the facts in the case.—*Anderson v. McDonald.* 274

9. *Course of—Findings Signed in Absence of One Party—Vacation of Judgment—Grounds.* A motion to vacate a final judgment on the ground that the findings and conclusions were signed by the court in the absence of appellant's counsel was properly denied, where the findings and conclusions were served on appellant's attorneys before being presented to the court, and appellant was permitted to make exceptions to them, and was herself given an opportunity to submit findings and conclusions, which were denied.—*Lamona v. Cowley*..... 297

10. *Instructions—Curing Error.* Error of the court in charging the jury as to permanent injuries to plaintiff in an action to recover for personal injuries in which no claim was set up for permanent injuries, was cured by the court's later instruction to disregard what had been said by him as to permanent injuries and his explanation to the jury that no claim for such injuries was involved in the case.—*Gallagher v. Town of Buckley*..... 380

11. *Discharge of Jury.* Where there are no disputed facts in the evidence, but merely questions of law for the court are presented, the discharge of the jury is proper, since there is nothing for it to pass upon.—*West Seattle Land & Imp. Co. v. Novelty Mill Co.*..... 435

12. *Misconduct of Court—Expression of Opinion as to Amount of Damages.* Where the prayer of the com-

TRIAL—CONTINUED.

plaint in an action for damages was for judgment in the sum of \$25,500, it was not the expression of an opinion on the part of the court to charge the jury that, if their verdict should be for plaintiff, they should find his damage to be in an amount not exceeding the sum of \$25,500.—*Goldthorpe v. Clark-Nickerson Lumber Co.*..... 467

13. *Instructions—Construction as a Whole.* The instructions of the court must be considered as a whole, and error cannot be predicated upon the incompleteness of one of the instructions, when the alleged omission is amply and clearly covered elsewhere in the charge.—*Id.* 467
14. *Admission of Evidence—Comments by Court—Harmless Error.* An alleged copy of a disputed assignment being admissible on a showing that the original had been delivered to defendant who refused to produce it on demand, it was not prejudicial error for the court to remark, at the time the copy was offered in evidence, "It would be admissible for what it is worth—what it shows; just as much as the original would be," when subsequent testimony and instructions made it clear to the jury that defendant denied the existence of the original assignment.—*Nunn v. Jordan* 506
15. *Instructions—Comment on Evidence.* A comment by the court in his charge to the jury upon a matter not material under the issues would not constitute prejudicial error.—*Id.* 506
16. *Conflicting Evidence—Question for Jury.* Where a principal has testified that he does not remember having authorized his agent to send a certain telegram, but the agent testifies positively that he was so authorized, there is no such substantial conflict as to require the submission of the question to the jury.—*Norman v. Western Union Telegraph Co.*..... 577

See APPEAL, 12, 29, 31, 41, 44, 45, 46; CARRIERS, 4; CRIMINAL LAW, 2-4, 8, 12-15; MALICIOUS PROSECUTION; MASTER AND SERVANT, 3-7, 12, 13; MUNICIPAL CORPORATIONS, 5, 16; NEGLIGENCE, 3; NUISANCE, 1-5; RAILROADS, 3.

TROVER AND CONVERSION.

1. *Conversion—Unauthorized Loan by Bank Cashier—Pleading—Immaterial Allegations.* In an action against bank officers for the conversion of funds, allegations in the complaint to the effect that the converted funds were pretended to be loaned by defendants to a speculative corporation without mercantile credit were immaterial. —*First National Bank of Pullman v. Gaddis*..... 596
2. *Same—Evidence—Materiality.* Where defendants in such an action are charged with converting money of the bank to their own use, evidence that the corporation to which they claimed the funds had been loaned was of a speculative character, without property, and unworthy of credit was properly excluded because of its immateriality.—*Id.* 596

See BANKS AND BANKING.

TRUSTS.

1. *Resulting Trust—Agreement to Purchase Land.* Where two parties take a joint option for the purchase of land, and then determine not to buy, but, after the expiration of the option, one of them purchases the land in his own interest, the other has no right of action to have the purchaser declared a trustee for his benefit.—*Gilbert v. Windhusen* 249
2. *Enforcement of Trust—Laches.* An agreement whereby a mortgagee was to be permitted to foreclose without opposition on the understanding that he was to make a declaration of trust in the premises in favor of the mortgagor cannot be enforced by reason of the laches of plaintiff, where suit to enforce it was not brought until four months after the death of the alleged trustee, at a date more than seven years after such trustee had acquired title under the foreclosure, the only excuse for delay being that he had promised to execute a declaration of trust at various times, and had refused so to do at a period only three months prior to his death.—*Snipes v. Kelleher*..... 386
3. *Resulting Trust—Purchase of Realty.* The fact that plaintiff paid all the money required as the purchase

TRUSTS—CONTINUED.

price of a tract of land conveyed to defendant would not create a resulting trust in favor of plaintiff for the whole of such land, when the agreement between the parties was that plaintiff was to have but one-half of the tract for the money advanced by him.—*Funk v. Hensler* 528

See EQUITY, 3.

VENDOR AND PURCHASER.

1. *Right of Forfeiture—Waiver by Parol.* The time of performance of a written contract for the sale of land, although of the essence thereof, may be waived by subsequent oral agreement.—*Whiting v. Doughton*..... 327
2. *Same—Estoppel.* Where the purchaser of land has been led to believe from the conduct of the vendor that a right given under the contract to declare a forfeiture has been waived, the vendor will be estopped from enforcing forfeiture.—*Id.* 327
3. *Same—Default in Installments—Rights of Purchaser.* After waiver of the vendor's right of forfeiture, by reason of failure in payments, the purchaser would not be in default until after demand upon him for payment of the installments due and the lapse of a reasonable time in which to meet the demand.—*Id.*..... 327

VENUE. See APPEAL, 6.

VERDICT. See NEW TRIAL, 2.

WILLS.

1. *Construction—Jurisdiction of Superior Court Sitting in Probate.* A superior court sitting in probate has jurisdiction to entertain a proceeding to construe a will, as such courts are not shorn of their general powers conferred by the constitution by the further provision vesting them with jurisdiction "of all matters of probate," so as to restrict their jurisdiction to that of probate courts when acting as such.—*Reformed Presbyterian Church v. McMillan* 643

WILLS—CONTINUED.

2. *Designation of Devisee—Defective Description.* The intent of a testator to make a devise to the "Reformed Presbyterian Church of North America, General Synod," although the will recited the devise as in favor of the "Board of Directors of the Society for Disabled Ministers of the Reformed Presbyterian Church of Illinois," is evident from the fact that there was no such body in existence as the devisee named; that the testator was a member of the Reformed Presbyterian Church of North America, whose governing body was the General Synod; that he had belonged to a congregation thereof in Illinois prior to his removal to the state of Washington and all his life had taken great interest in that organization; that on the occasion of his last visit to his old home and church in Illinois the General Synod had recently established a fund for the relief of disabled ministers, which it had put in charge of a "Committee on Disabled Ministers' Fund;" that collections were being taken in the churches at that time for the purpose; and that the subject was a matter of interested discussion among his relatives whom he was then visiting, a former minister of the congregation to which the testator had belonged being one of the beneficiaries of such fund.—*Id.*..... 643
3. *Same—Parol Evidence.* Parol evidence is admissible for the purpose of removing the latent ambiguity occasioned by the defective designation of the devisee, where there are words of designation, but a mistake in the name.—*Id.* 643

See EXECUTORS AND ADMINISTRATORS, 3.

WITNESSES.

1. *Refreshing Memory by Reference to Record.* A hotel keeper is competent to testify as to the presence of a guest in his hotel on a certain date, after refreshing his memory by reference to his register, when it appears that the entries therein were made by him in the usual way in the regular course of business and in accordance with the facts existing at the time.—*State v. Douette*... 6

WITNESSES—CONTINUED.

2. *Transactions With Deceased Partner.* Under Bal. Code, § 5991, which provides that in an action where the adverse party derives right or title by, through, or from any deceased person, then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with such deceased person, evidence of a transaction had with a deceased member of a partnership is inadmissible, when the surviving partner was not present nor had any personal knowledge of the transaction.—*Bay View Brewing Co. v. Grubb* 34
3. *Same—Action on Promissory Note—Testimony as to Alteration—Competency.* The indorser of a promissory note cannot testify that a waiver of demand and notice was not on the back of the note when he indorsed it, where action is brought upon the note by the successor in interest of a deceased person with whom the transaction had been had.—*Id.*..... 34
4. *Exclusion of Testimony.* Testimony of a witness as to statements made to him by a defendant charged with rape concerning the latter's impotency was properly excluded, where the question was general and indefinite as to time.—*State v. Bailey*..... 89
5. *Capacity of Child to Testify—Discretion of Court.* The capacity of a witness of tender years to understand the nature of an oath is a question for the discretion of the trial judge, and will be disturbed on appeal only in cases where the record shows manifest abuse of discretion.—*Id.* 89
6. *Cross-Examination.* Where a witness had not been examined in chief as to complaints made by the prosecutrix at police headquarters as to pains or injuries sustained by her as the result of an alleged rape, cross-examination on the subject was not proper.—*Id.*..... 89
7. *Same.* In an action for the death of a coal miner, due to the fact that the timbers in the air-shaft caught fire from fires outside the mine, it was not error to allow a witness to be asked on cross-examination, although not examined in chief on the point, as to whether, if a system of bells had been provided in the mine, deceased

WITNESSES—CONTINUED.

- could have been notified of the fire in time to have saved his life, where the witness had testified in chief that he was superintendent of the mine and had been examined as an expert upon the proper handling of the mine.—*Vowell v. Issaquah Coal Co.*..... 103
8. *Same*. Prejudicial error cannot be assigned upon the refusal of the court to permit cross-examination as to a certain matter, when the same ground had already been reasonably covered in prior cross-examination of the witness.—*Nunn v. Jordan* 506
9. *Repeated Examination*. Where an extended examination has been had upon a certain subject in evidence, the refusal of the court to permit further examination going over the same ground would not be error.—*Id.*.... 506

WORK AND LABOR.

Services by Member of Family—Contract for Remuneration—Sufficiency of Evidence. In an action by a sister to recover the value of services as housekeeper for a brother during a period of nine years, it was not error to direct a verdict for defendant, where it appeared that plaintiff, after the death of her husband, came with her daughter to live at the home of her brother and keep house for him, there being no agreement or understanding as to any charge for services, and nothing in the conduct of the parties to imply a contract other than one for maintenance.—*McBride v. McGinley*..... 573

Ex. J. M.
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